

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P. § Case No. **19-34054-SGJ-11**
The Charitable DAF Fund LP §

Appellant § 22-03052

vs. §

Highland Capital Management, L.P. §

Appellee § **3:22-CV-02280-S**

**[43] Order granting amended motion to dismiss adversary proceeding with prejudice (related
document # 19) Entered on 9/30/2022**

APPELLANT RECORD

VOLUME 18

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
Debtor.	§
THE CHARITABLE DAF FUND, L.P.	§
Plaintiff,	§ Adversary Proceeding No.
vs.	§ 22-03052-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
Defendant.	§

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**APPELLANT'S SECOND AMENDED STATEMENT OF ISSUES AND
DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. ("Appellant") hereby designates the following items to be included in the record and identifies the following issues with respect to its appeal of the Order Granting Defendant's Amended Motion to Dismiss Adversary Proceeding [Doc.43] which

was entered by the United States Bankruptcy Court for the Northern District of Texas on September 30, 2022.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

Whether the Bankruptcy Court erred in granting Defendant's Amended Motion to Dismiss Adversary Proceeding.

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 46].

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2. The judgment, order, or decree appealed from: Order Granting Amended Motion to Dismiss Adversary Proceeding [Doc. 43].

3. Any opinion, findings of fact and conclusions of law of the bankruptcy court relating to the issues on appeal, including transcripts of all oral rulings: None.

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 22-03052-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	5/25/22 (7/22/21)	1	(18 pgs; 4 docs) Adversary case 22-03052. ORDER REFERRING CASE 3:21-CV-1710-N from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division and Complaint by Charitable DAF Fund, LP against Highland Capital Management, L.P. Fee Amount \$350 (Attachments: # <u>1</u> Original Complaint # <u>2</u> Civil Cover Sheet # <u>3</u> Docket Sheet from 21-CV-1710). Nature(s) of suit: 02 (Other (e.g., other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, Marcey)
2	5/25/22 (10/5/21)	8	(8 pgs; 2 docs) MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) filed by Highland Capital Management LP (Attachments: # <u>1</u> Exhibit A) Attorney Zachery Z. Annable added to party Highland Capital Management LP(pty: dft) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #8 ON

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<i>Vol. 2</i> <i>000066</i>			10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
<i>000081</i>	3	5/25/22 (10/5/21)	9 <p>(15 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #9 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)</p>
<i>Thru Vol. 6</i>	4	5/25/22 (10/5/21)	10 <p>(1012 pgs; 28 docs) Appendix in Support filed by Highland Capital Management LP re 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3 # <u>4</u> Exhibit 4 # <u>5</u> Exhibit 5 # <u>6</u> Exhibit 6 # <u>7</u> Exhibit 7 # <u>8</u> Exhibit 8 # <u>9</u> Exhibit 9 # <u>10</u> Exhibit 10 # <u>11</u> Exhibit 11 # <u>12</u> Exhibit 12 # <u>13</u> Exhibit 13 # <u>14</u> Exhibit 14 # <u>15</u> Exhibit 15 # <u>16</u> Exhibit 16 # <u>17</u> Exhibit 17 # <u>18</u> Exhibit 18 # <u>19</u> Exhibit 19 # <u>20</u> Exhibit 20 # <u>21</u> Exhibit 21 # <u>22</u> Exhibit 22 # <u>23</u> Exhibit 23 # <u>24</u> Exhibit 24 # <u>25</u> Exhibit 25 # <u>26</u> Exhibit 26 # <u>27</u> Exhibit 27) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #10 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)</p>
<i>Vol. 7</i> <i>001093</i>	5	5/25/22 (10/5/21)	11 <p>(8 pgs; 2 docs) MOTION to Dismiss (Highland Capital Management, L.P.'s Motion to Dismiss) filed by Highland Capital Management LP (Attachments: # <u>1</u> Exhibit A) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #11 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)</p>
<i>001101</i>	6	5/25/22 (10/5/21)	12 <p>(10 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re 11 MOTION to Dismiss (Highland Capital Management, L.P.'s Motion to Dismiss) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #12 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)</p>
<i>001111</i>	7	5/25/22 (10/5/21)	13 <p>((238 pgs; 4 docs) Appendix in Support filed by Highland Capital Management LP re 11 MOTION to Dismiss (Highland Capital Management, L.P.'s Motion to Dismiss) (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710</p>

VOL. 8 001349			AS #13 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
001352	8 5/25/22 (10/27/21)	15	(3 pgs) RESPONSE filed by Charitable DAF Fund LP re: 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Sbaiti, Mazin) [ORIGINALLY FILED IN 21-CV-1710 AS #15 ON 10/27/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
001359	9 5/25/22 (11/5/21)	16	(7 pgs) REPLY filed by Highland Capital Management LP re: 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #16 ON 11/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
001361 001369	10 5/25/22 (11/21/21)	18	(2 pgs) ORDER re: 8 Motion for Reconsideration. The Court grants Defendant's motion, lifts the stay, and refers this case to Judge Stacey G.C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, to be adjudicated as a matter related to the Chapter 11 Bankruptcy of HCM., Chapter 11 Case No. 10-34054. The Clerk of this Court and the Clerk of the Bankruptcy Court to which this case is referred are directed to take such actions as are necessary to docket this matter as an Adversary Proceeding associated with the aforementioned consolidated bankruptcy case. (Ordered by Judge David C Godbey on 5/19/2022) (oyh) (Main Document 18 replaced on 5/23/2022) (twd). (Entered: 05/20/2022) [ORIGINALLY FILED IN 21-CV-1710 AS #18 ON 11/21/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (*ERROR IN ENTRY: CORRECT CASE NUMBER IS: 19-34054*) (Okafor, Marcey)
001381	11 5/27/22	19	(8 pgs; 2 docs) Amended Motion to dismiss adversary proceeding (related document(s):11) filed by Defendant Highland Capital Management, L.P. (Attachments:# 1 Exhibit A-Proposed Order) (Annable, Zachery)
Thru Vol. 10	12 5/27/22	20	(12 pgs) Brief in support filed by Defendant Highland Capital Management, L.P. (RE: related document(s)19 Amended Motion to dismiss adversary proceeding (related document(s):11)). (Annable, Zachery)
	13 5/27/22	21	(637 pgs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Amended</i>

			<i>Motion to Dismiss) filed by Defendant Highland Capital Management, L.P. (RE: related document(s):19 Amended Motion to dismiss adversary proceeding (related document(s):11)). (Annable, Zachery)</i>
<i>Vol. 11</i>	14	6/1/22	23 <i>(6 pgs; 2 docs) Notice of hearing filed by Defendant Highland Capital Management, L.P. (RE: related document(s):19 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, L.P.). Hearing to be held on 8/3/2022 at 02:30 PM at https://uscourts.webex.com/meet/jerniga for 19 and for 19. (Attachments: # 1 Exhibit A)(Hayward, Melissa)</i>
<i>002018</i>	15	7/5/22	30 <i>(12 pgs) Response opposed to (related document(s): 19 Amended Motion to dismiss adversary proceeding (related document(s):11) filed by Defendant Highland Capital Management, L.P.) filed by Plaintiff Charitable DAF Fund, LP . (Ecker, C.) (Entered: 07/06/2022)</i>
<i>002024</i>	16	7/26/22	31 <i>(15 pgs) Reply to (related document(s): 30 Response filed by Plaintiff Charitable DAF Fund, LP) filed by Defendant Highland Capital Management, L.P.. (Annable, Zachery)</i>
<i>002036</i>	17	7/26/22	32 <i>(865 pgs) Support/supplemental document (<i>Amended Appendix in Support of Highland Capital Management, L.P.'s Amended Motion to Dismiss</i>) filed by Defendant Highland Capital Management, L.P. (RE: related document(s):21 Support/supplemental document). (Annable, Zachery)</i>
<i>Vol. 15</i>	18	8/1/22	34 <i>(867 pgs; 23 docs) Witness and Exhibit List (<i>Reorganized Debtor's Witness and Exhibit List with Respect to Evidentiary Hearing to Be Held on August 3, 2022</i>) filed by Defendant Highland Capital Management, L.P. (RE: related document(s):19 Amended Motion to dismiss adversary proceeding (related document(s):11)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14 # 15 Exhibit 15 # 16 Exhibit 16 # 17 Exhibit 17 # 18 Exhibit 18 # 19 Exhibit 19 # 20 Exhibit 20 # 21 Exhibit 21 # 22 Exhibit 22) (Annable, Zachery)</i>
<i>002916</i>			
<i>Thru Vol. 18</i>			
<i>Vol. 19</i>	19	8/3/22	40 <i>(1 pg) Court admitted exhibits date of hearing August 3, 2022 (RE: related document(s):19 Amended Motion to dismiss adversary proceeding (related document(s):11) filed by Defendant Highland Capital Management, L.P. (Attachments: # 1 Exhibit A--Proposed Order)) COURT ADMITTED EXHIBIT 17. COURT TOOK JUDICIAL NOTICE OF EXHIBITS 1-13, 21 AND 22. (Ellison, T.) (Entered: 08/04/2022)</i>
<i>003783</i>			
<i>Thru Vol. 22</i>			

<i>001.22</i> <i>004651</i>	20	9/30/22	42	(28 pgs) Memorandum of opinion regarding Defendant's amended motion to dismiss adversary proceeding (RE: related document(s) <u>19</u> Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, L.P.). Entered on 9/30/2022 (Okafor, Marcey)
<i>004679</i>	21	8/4/22	41	41 Transcript regarding Hearing Held 08/03/2022 (45 pages) RE: Motion to Dismiss Adversary Proceeding (19). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 11/2/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Kathy Rehling, kathyrehlingtranscripts@gmail.com, Telephone number 972-786-3063. (RE: related document(s) 37 Hearing held on 8/3/2022. (RE: related document(s) <u>19</u> Amended Motion to dismiss adversary proceeding (related document(s): <u>11</u>) filed by Defendant Highland Capital Management, L.P.) (Appearances: G. Demo and Z. Annabel for Movant/Highland; J. Bridges for Respondant/Charitable DAF. Evidentiary hearing. Motion granted. Court to issue Opinion and Order.)). Transcript to be made available to the public on 11/2/2022. (Rehling, Kathy)

Dated: November 28, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 28th day of November, 2022.

/s/ Mazin A. Sbaiti
Mazin A. Sbaiti

1 two, the order asserts jurisdiction -- sole jurisdiction, even
2 -- over proceedings in which withdrawal of the reference is
3 mandatory under 157(d).

4 The fourth major problem is what the Court called
5 specificity at the previous hearing. The Fifth Circuit's
6 *Applewood Chair* case holds that the rule from *Shoaf* does not
7 apply without a "specific discharge or release," and that that
8 release has to be enumerated and approved by the Bankruptcy
9 Court. Thus, the order here can't exculpate Mr. Seery of
10 liability for ordinary negligence and the like in a blanket
11 fashion. The claims being released must be identified.

12 That's what happened in *Shoaf*. *Shoaf*'s guaranty
13 obligation was explicitly released. That's also what happened
14 in *Espinosa*. *Espinosa*'s plan listed his student loan as his
15 only specific indebtedness. But it's not what happened here.
16 And it couldn't happen here, because the ordinary negligence
17 and similar claims being discharged by the order had not yet
18 accrued and thus were not even in existence at the time the
19 order issued.

20 Instead, what we have here is a nonconsensual, nondebtor
21 injunction or release that's precisely what the Fifth Circuit
22 refused to enforce in the *Pacific Lumber* case.

23 So, lack of specificity is the third major problem with
24 the order. And that brings us to the fourth problem, which is
25 the *Barton* doctrine. *Barton* is the only possible basis for

1 this Court to assert exclusive or sole jurisdiction over
2 anything. Outside of *Barton*, it's plain black letter law that
3 the District Court's jurisdiction is equal to and includes
4 anything that this Court's derivative jurisdiction would also
5 reach.

6 But the exception to the *Barton* doctrine in 959(a) plainly
7 applies here, leaving no basis for exclusivity with regards to
8 jurisdiction and the District Court. That's because Mr. Seery
9 is carrying on the business of a debtor and managing the
10 property of others, rather than merely administering the
11 bankruptcy estate. The exclusive jurisdiction function of the
12 *Barton* doctrine has no applicability because 959(a) creates
13 that exception here.

14 Under its general equity powers, yes, 959(a) still
15 authorizes this Court to exercise some control over actions
16 against Mr. Seery, but short of depriving litigants of their
17 day in court. And nothing in 959(a), that exception to
18 *Barton*, says that the Court can nonetheless exercise
19 exclusivity in that jurisdiction. Those general equity powers
20 do not create exclusive or sole jurisdiction. They do not
21 deprive the District Court of its Congressionally-granted
22 original jurisdiction.

23 Moreover, Mr. Seery is not an appointed trustee entitled
24 to the protections of the *Barton* doctrine in any case. His
25 appointment was a corporate decision that the Court was asked

1 not to interfere with. The Court was asked to defer under the
2 business judgment rule to the Debtor's appointment of Mr.
3 Seery. And the Court did so.

4 As we asserted last time, no authority that we can find
5 combines these two unrelated doctrines, the *Barton* doctrine
6 and the business judgment rule. And they don't go together.
7 None of the testimony or the briefing or argument, in the July
8 order, in the January order that preceded it, none of that
9 indicated that Mr. Seery would be a trustee or the functional
10 equivalent of a trustee. The word "trustee" does not appear
11 in any of those briefs or transcripts.

12 Opposing -- and because of that, the District Court suit
13 is not about -- well, not because of that. The District Court
14 suit simply is not about any trustee-like role that Mr. Seery
15 may have played anyway. Opposing counsel will try to convince
16 you otherwise, will tell you that the District Court case is a
17 collateral attack on the settlement, but it's not. Wearing
18 his estate administrator hat, Mr. Seery can settle claims in
19 this court. Wearing his advisor hat, he has to fulfill his
20 Advisers Act duties and properly advise his clients.

21 He doesn't have to wear both hats, and it seems highly
22 unusual that he would choose to fill both of those roles
23 simultaneously. But he has chosen both roles. And the
24 District Court case is a hundred percent about his role as an
25 advisor. Did he comply with the Act? Did he do the things

1 that his advisor role obligated him to do as a manager of that
2 property?

3 The District Court suit really is only being used to
4 illustrate the issues that we're raising here. It's
5 important, it's timely to address those issues now because of
6 the District Court action, but that's an illustration of the
7 problems with the order. It is not exclusively that that
8 action is what we're attempting to address. Rather, the order
9 exculpating Mr. Seery from ordinary negligence liability and
10 similar liability is problematic, is contrary to the law. On
11 top of that, the Court is asserting jurisdiction over gross
12 negligence and intentional misconduct claims. To the extent
13 that 157(d) applies, it is problematic and contrary to law as
14 well.

15 THE COURT: Okay. We're occasionally getting some
16 breakup of your sound. So please -- I don't know what you can
17 do to adjust, but it was just now, and intermittently we get a
18 little bit of garbly. So if you could just say your last
19 sentence one more time, and we'll see if it improves.

20 MR. BRIDGES: Your Honor, I'm not sure I can say this
21 last sentence again.

22 THE COURT: Okay.

23 MR. BRIDGES: I was -- I was mentioning that the
24 District Court case is an illustration of our argument. Our
25 argument is not merely that the District Court case should be

1 exempted or excepted from the order. Our argument is that the
2 order is legally infirm and that the District Court case and
3 the claims there illustrate some of those infirmities, but
4 that the infirmities go beyond just what's at issue in the
5 District Court case.

6 In sum, there are four problems with the order that render
7 parts of it legally infirm. It deprives the right of a jury
8 trial -- in fact, of any trial -- in contravention of 959(a)
9 for some causes of action.

10 It asserts jurisdiction -- two, it asserts jurisdiction
11 over claims that are subject to the mandatory withdrawal of
12 the reference provision (garbled) 157(d).

13 And three, it lacks the specificity required to discharge
14 future claims under *Applewood*.

15 Finally, Your Honor, number four, the order relies on the
16 *Barton* doctrine, which doesn't apply and which 959(a) creates
17 an exception to.

18 Movants respectfully submit the order should be modified
19 for those reasons.

20 MR. SBAITI: Tell him Mark Patrick is here, for the
21 record.

22 THE COURT: All right. I have a couple of follow-up
23 questions for you. I want to drill down on the issue of your
24 client not having appealed the July 2020 order. Or the
25 HarbourVest settlement order, for that matter. Tell me as

1 directly as possible why you don't view that as a big problem.
2 Because it's high on my list of possible problems here.

3 MR. BRIDGES: I understand, Your Honor. The
4 *Applewood Chair* case is our -- our defense to that argument,
5 that without providing specifics as to the claims being
6 discharged in the July order, that *Shoaf* cannot apply to
7 create a res judicata effect from the failure to appeal that
8 order.

9 THE COURT: But is that really what we're talking
10 about, a discharge of certain claims? We're talking about a
11 protocol that the Court established which wasn't appealed.

12 MR. BRIDGES: Your Honor, your order does many
13 things. We're talking about a few of them in one paragraph of
14 the order. And in that order -- in that paragraph, yes, it
15 creates a protocol for determining the colorability of some
16 claims, claims that rise to the level of gross negligence or
17 intentional misconduct. It does not create a protocol for
18 claims that fall below that threshold, claims for ordinary
19 negligence, as an example.

20 THE COURT: Okay.

21 MR. BRIDGES: For breach of contract that's not
22 intentional, is not grossly negligent, it's just a breach of
23 contract. It can even be faultless. There's still liability.
24 There's still a jury right under the Seventh Amendment for
25 faultless breach of contract.

1 The protocols in the order do not address such claims
2 other than to bar them. To discharge them. And thus, yes,
3 it's a release, it's a discharge of those claims. It can be
4 viewed as a permanent injunction against bringing such claims.
5 It's what's -- it's what's not allowed by the *Applewood Chair*
6 case and by *Pacific Lumber*.

7 THE COURT: All right. So you're arguing that was --
8 the wording of the order was not specific enough to apprise
9 affected parties of what they were releasing, they're
10 releasing claims based on ordinary negligence against Mr.
11 Seery? That's not specific enough?

12 MR. BRIDGES: Correct. Future unproved claims, the
13 factual basis for which has not happened yet. Those cannot be
14 and were not disclosed with any specificity in this order.

15 If we compare it to *Shoaf* and to *Espinosa*, in *Shoaf* what
16 we had was a guaranty, *Shoaf*'s guaranty on a transaction that
17 was listed in the actual release, describing what the
18 transaction was that was being -- that the guaranty was being
19 released for.

20 In *Espinosa*, what we had was a student loan --

21 THE COURT: Right.

22 MR. BRIDGES: -- that was listed in the plan
23 specifically, as the only specific indebtedness.

24 Here, we don't have any of that specificity. What we have
25 is a notice to the entire world, Your Honor, that for an

1 unlimited period of time any claim for ordinary negligence,
2 for ordinary breach of contract or fiduciary duty against Mr.
3 Seery is barred if it relates to his CEO role. And his CEO
4 role means as a manager of property, exactly precisely what
5 959(a) is talking about.

6 Those jury rights (garbled) claims cannot be released,
7 discharged, expunged, done away with, in an order that isn't
8 explicit.

9 On top of that, even in an explicit order, 959(a) tells
10 the Court it cannot deprive a litigant of its jury trial
11 right.

12 THE COURT: Well, as anyone knows who's been around a
13 while in this case, my brain sometimes goes down an unexpected
14 trail, and maybe this one is one of those situations. Are
15 there contracts that your clients would rely on in potential
16 litigation?

17 MR. BRIDGES: Yes, Your Honor.

18 THE COURT: What are those contracts?

19 MR. BRIDGES: It is a management contract. I don't
20 think I can give you the specifics at this moment, but I
21 probably can before we're done here today. A management
22 contract in which the Debtor provides advisory and management
23 services to the DAF --

24 THE COURT: Well, you know, the shared services
25 agreements that we heard so much about in this case? A shared

1 service agreement? I can't remember, you know, which entities
2 have them and which do not at times. So, --

3 MR. BRIDGES: The shared services agreement is one of
4 those contracts, Your Honor.

5 THE COURT: Okay.

6 MR. BRIDGES: It's not the only one.

7 THE COURT: And what are the others?

8 MR. BRIDGES: There's -- the other is the investment
9 advisory agreement.

10 THE COURT: Those two?

11 MR. BRIDGES: (no response)

12 THE COURT: Those are the only two?

13 MR. BRIDGES: There may be one other, Your Honor.
14 I'm not sure.

15 THE COURT: Are they in evidence?

16 MR. BRIDGES: I can find out shortly.

17 THE COURT: Are they in evidence? We haven't talked
18 about evidence yet, but are they going to be in evidence,
19 potentially?

20 MR. BRIDGES: They are referenced in the District
21 Court case, the complaint, which is in evidence.

22 THE COURT: I'm asking, are --

23 MR. BRIDGES: But those contracts I don't believe are
24 listed as exhibits here in this motion, no.

25 THE COURT: They are not? Okay.

1 Well, what my brain is thinking about here is, of the
2 umpteen agreements I've seen -- more than umpteen -- of the
3 many, many agreements I've seen over time in this case, so
4 often there's a waiver of jury trial rights, as I recall, as
5 well as an arbitration clause. I just was curious, hmm, you
6 know, you talked a lot about your clients' jury trial rights:
7 do we know that these agreements have not waived those?

8 MR. BRIDGES: Your Honor, I think I can answer that
9 by the end of our hearing. I don't have an answer off the top
10 of my head. What I can tell you is a jury right has been
11 demanded in the federal court complaint, which is in evidence,
12 and that opposing counsel has brought no evidence indicating
13 that they have the defense of our having waived the right to a
14 jury trial here.

15 THE COURT: Okay. Well, I just --

16 MR. BRIDGES: Or arbitra...

17 THE COURT: -- would think that you would know that.
18 Does anyone know that on the Debtor's side off the top of your
19 head?

20 MR. POMERANTZ: I do not, Your Honor.

21 THE COURT: Uh-huh.

22 MR. POMERANTZ: And to Mr. Bridges' last point, we
23 have filed a motion to dismiss. We have not answered the
24 complaint. So any time to object to their jury trial right
25 would be in the context of the answer. So the implication

1 that we have not raised the issue and therefore it doesn't
2 exist is just not a correct implication and connection he's
3 trying to draw.

4 THE COURT: Okay. All right.

5 Well, let me also ask you about this. I'm obsessing a
6 little over the *Barton* doctrine and your insistence that it
7 does not provide authority or an analogy here.

8 Well, for one thing, is there anything in the Fifth
9 Circuit case *Sherman v. Ondova* that you think either helps you
10 or hurts you on that point? I'm intimately familiar with it,
11 although I haven't read it in a while, because it was my
12 opinion that the Fifth Circuit affirmed. And I spent a lot of
13 time thinking about that. It was a trustee, a traditional --
14 well, no, a Chapter 11 trustee and his counsel. But anything
15 from that case that you think is worthy of pointing out here?

16 MR. BRIDGES: No, Your Honor. I'm not -- nothing
17 comes to mind. That case is not fresh on my mind.

18 What I would tell you is that *Barton* doctrine and the
19 business judgment rule are incompatible, and the appointment
20 of a trustee never involves application of the business
21 judgment rule or deference to the Debtor or another party in
22 terms of making that appointment.

23 The *Barton* doctrine, as it applies to trustees, is viewed
24 as an extension, to some extent, of judicial immunity to the
25 trustee, who is chosen by, selected by the Court and assigned

1 by the Court to carry out certain functions. That --

2 THE COURT: Well, let me --

3 MR. BRIDGES: -- quasi-immunity --

4 THE COURT: -- stop you there. You say it's an
5 extension of immunity. But isn't it, by nature, really a
6 gatekeeping provision? It's a gatekeeping provision, right?
7 Before you even get to immunity, maybe, in a lawsuit, it's a
8 gatekeeping function that the Supreme Court has blessed, you
9 know, obviously in the context of a receiver, but appellate
10 courts have blessed it in the bankruptcy context. The
11 Bankruptcy Court can be the gatekeeper on whether the trustee
12 or someone I think in a similar position can get sued or not.

13 And then we had that Fifth Circuit case after *Ondova*. It
14 begins with a *V, Villegas* or something like that. Didn't
15 that, I don't know, further ratify, if you will, the whole
16 *Barton* doctrine by saying, oh, just because they're noncore
17 claims, state law or non-bankruptcy law claims, doesn't mean,
18 after *Stern*, the Bankruptcy Court still cannot serve the
19 gatekeeper function.

20 Tell me what you disagree. That's my kind of combined
21 reading of all of that.

22 MR. BRIDGES: Your Honor, I have to parse it out.
23 There's a lot to unpack there. If I can make sure to get in
24 the follow-ups, I can start with saying it's okay for the
25 Court in many instances to act as a gatekeeper.

1 THE COURT: Okay.

2 MR. BRIDGES: Both under *Barton* -- under *Barton*, or
3 when the *Barton* exception in 959(a) applies, under the Court's
4 general equitable powers, that gatekeeping functions are not
5 across-the-board prohibited, --

6 THE COURT: Okay.

7 MR. BRIDGES: -- and we aren't trying to argue that
8 they're prohibited across the board.

9 THE COURT: Okay.

10 MR. BRIDGES: Now, to try to dig into that a little
11 deeper, the order does two things: gatekeeping as to some
12 claims, and, frankly, discharging or barring other claims.
13 Those are two separate functions.

14 The first one, the gatekeeping, may be, in some
15 circumstances, which we'll come to, many circumstances, may be
16 allowable, may be even mandatory under *Barton*, not even
17 requiring an order from this Court, for the gatekeeping of
18 *Barton* to apply. But nonetheless, allowable in many instances
19 under the Court's general equity powers under 959(a). That
20 part is right about gatekeeping.

21 It does not create jurisdiction in this Court where 157(d)
22 deprives this Court of jurisdiction. Just because it's
23 related to bankruptcy isn't enough to say that the Court
24 therefore has jurisdiction if, one, if mandatory withdrawal of
25 the reference is required.

1 Furthermore, Your Honor, that gatekeeping function, under
2 the equity powers authorized by 959(a), will not allow a court
3 to discharge or -- or deprive, is the word I'm looking for --
4 deprive a litigant of their right to a trial -- a specific
5 kind of trial, a jury trial -- but a trial. And by crafting
6 an order that says certain kinds of claims that do (garbled)
7 jury rights are barred, rather than just providing a
8 gatekeeper provision, flat-out bars them, that doesn't -- that
9 doesn't comply with 959.

10 THE COURT: Okay.

11 MR. BRIDGES: Your Honor, if I could add one last
12 thing.

13 THE COURT: Go ahead.

14 MR. BRIDGES: The Supreme Court's *Stern* case points
15 out that -- that it's -- well, actually, it's the *Villegas*
16 case from the Fifth Circuit --

17 THE COURT: The one I mentioned.

18 MR. BRIDGES: -- points out that *Stern* -- *Stern* --
19 yes, you did. *Stern* did not create an exception to the *Barton*
20 doctrine. And that gives -- that endorses a *Barton* court's
21 ability to perform gatekeeping, even over claims that *Stern*
22 says there would not be jurisdiction over.

23 Contrast that with 959(a), which *Collier on Bankruptcy* and
24 the Fifth Circuit have held is an exception to the *Barton*
25 doctrine. Because of that exception, *Barton* no longer

1 applies, and what you're using in invoking a gatekeeper order
2 is the Court's inherent equitable powers, its general powers
3 in equity. And those equity powers are cabined. They're
4 broad, but they're cabined by 959(a)'s prohibition of doing
5 away with a litigant's right to a trial, a jury trial.

6 Now, I also -- counsel is telling me I should note for the
7 record that Mr. Mark Patrick is here as a representative of
8 our clients. But Your Honor, I'll -- I will quit now unless
9 you have further questions for me.

10 THE COURT: All right. I do not at this time. Mr.
11 Morris or Mr. Pomerantz, who's going to make the argument?

12 MR. POMERANTZ: It's me, Your Honor.

13 OPENING STATEMENT ON BEHALF OF THE DEBTOR

14 MR. POMERANTZ: And I'll start with the jury trial
15 right. In the last few minutes, we have been able to
16 determine that the Second Amended and Restated Investment
17 Advisory Agreement between the DAF and the Debtor has a broad
18 jury trial waiver under 14(f). And in addition, as I will
19 include in my discussion, there is no private right of action
20 under the Investment Advisers Act.

21 I think those two points are fatal to Movants' argument,
22 and probably I can get away with not even responding to the
23 others. But since I prepared a lengthy presentation to
24 address the issues that were raised today, and also the half
25 hour that Mr. Bridges spent with Your Honor on June 8th in

1 which was his first opening statement on the motion for
2 reconsideration, I'll now proceed.

3 THE COURT: All right.

4 MR. POMERANTZ: The arguments that the Movants made
5 in the original motion essentially boil down to one legal
6 proposition, that the Court did not have jurisdiction to enter
7 the July 16th order because those orders impermissibly
8 stripped the District Court from jurisdiction, in violation of
9 (inaudible) Supreme Court precedent and 28 U.S.C. Section
10 157 (d) .

11 As with all things Dondero, the arguments continue to
12 morph, and you heard argument at the contempt hearing on June
13 8th and further argument today that now the prospective
14 exculpation for negligence in the order is also unenforceable
15 and should be modified.

16 Movants continue to try to distance themselves from the
17 January 9th order and argue that it is not relevant because
18 they seek to pursue claims against Mr. Seery as CEO and not as
19 an independent director. Movants ignore, however, that the
20 January 9th order not only protects Mr. Seery in his role as
21 the independent director, but also as an agent of the board.
22 I will walk the Court through my arguments on that issue in a
23 few moments.

24 Of course, the Movants had no explanation, Your Honor, for
25 the question of why it took them until May of 2021, 10 months

1 after the entry of the July 16th order that appointed Mr.
2 Seery as CEO and CRO, and 16 months after the Court appointed
3 the independent board, with Mr. Dondero's blessing and
4 consent, as a substitute for what would have surely been the
5 imminent appointment of a Chapter 11 trustee.

6 Movants try to distance themselves from the prior orders
7 by essentially arguing that the DAF is a newcomer to the
8 Chapter 11 and is not under Mr. Dondero's control but is
9 rather managed separately and independently by Mr. Patrick,
10 who recently replaced Mr. Scott.

11 The Movants admit, as they must, that the DAF is the
12 parent and the sole shareholder of CLO Holdco and conducts its
13 business through CLO Holdco, and both entities conduct their
14 business through one individual. It was Grant Scott then;
15 it's Mark Patrick now. So even if Mr. Dondero does not
16 control the DAF and CLO Holdco, which issue was the subject of
17 lengthy testimony in connection with the DAF hearing, both the
18 DAF and the CLO Holdco are bound by the Debtor's res judicata
19 argument, which I will discuss shortly.

20 In any event, I really doubt the Court is convinced that
21 the DAF operates truly independently of Mr. Dondero any more
22 than the Court has been convinced that the Advisors, the
23 Funds, Dugaboy and Get Good, all operate independently from
24 Mr. Dondero. The only explanation for the delay is that Mr.
25 Dondero has been and continues to be unhappy with the Court's

1 rulings and has now hired a new set of lawyers in a desperate
2 attempt to evade this Court's jurisdiction. Having failed in
3 their attempt to recuse Your Honor from the case, this is
4 essentially their last hope.

5 And these new lawyers, Your Honor, have not only filed
6 this DAF lawsuit in the District Court which is the subject of
7 the contempt motion and today's motion, but they also filed
8 another lawsuit in the District Court on behalf of an entity
9 called PCMG, another Dondero entity, challenging yet another
10 of Mr. Seery's postpetition decisions.

11 And there's no doubt that this is only the beginning. Mr.
12 Dondero recently told Your Honor at a hearing that there were
13 many more sets of lawyers waiting in the wings. And as the
14 Court remarked at the hearing on the Trusts' motion to compel
15 compliance with Rule 2015.3, the Trusts were trying through
16 that motion to obtain information about the Debtor's control
17 entities so that they could file more lawsuits against the
18 Debtor, a concern that Mr. Draper unconvincingly denied.

19 I would like to focus the Court preliminarily on exactly
20 what the January 9th and July 16th orders do, because Movants
21 try to confuse things by casting the entire order with a broad
22 brush of their jurisdictional overreach arguments, and they
23 misinterpret Supreme Court and Fifth Circuit precedent.

24 I would like to put up on the screen the language of
25 Paragraph 10 of the January 9th order and Paragraph 35

1 (garbled) of the July 16th.

2 Your Honor is very familiar with these orders, I'm sure,
3 having dealt with them in connection with confirmation and in
4 prior proceedings. But to recap, the orders essentially do
5 three things.

6 First, they require the parties to first come to the
7 Bankruptcy Court before commencing or pursuing a claim against
8 certain parties.

9 Second, they provided the Court with the sole jurisdiction
10 to make a finding of whether the party has asserted a
11 colorable claim of negligence -- of willful misconduct or
12 gross negligence.

13 And lastly, the orders provided the Court with exclusive
14 jurisdiction over any claims that the Court determined were
15 colorable.

16 The protected parties under the January 9th order are the
17 independent directors, their agents and advisors, which, as I
18 mentioned earlier, includes Mr. Seery -- who, at least as of
19 March 2020, was acting as the agent on the board's behalf as
20 the CEO -- for any actions taken under their direction.

21 The protected parties under the July 16th order are Mr.
22 Seery, as the CEO and CRO, and his agents and advisors.

23 Movants spend a lot of time in their moving papers and
24 reply arguing that the Court may not assert exclusive
25 jurisdiction over any claims that pass through the gate. They

1 also spend a lot of time arguing that the Bankruptcy Court
2 does not even have jurisdiction at all to assert -- to
3 adjudicate claims against Mr. Seery because such claims are
4 subject to mandatory withdrawal under Section 157(d).

5 The Debtor doesn't agree, and has briefed why mandatory
6 withdrawal of the reference is inapplicable. The Debtor has
7 also filed in the District Court a motion to enforce the
8 reference in effect in this district which refers cases in
9 this district arising under, arising in, or related to Chapter
10 11 to the Bankruptcy Court.

11 The motion to enforce the reference, Your Honor, which
12 extensively briefs this issue, is contained in Exhibit 3 of
13 the Debtor's exhibits.

14 We were somewhat surprised that the complaint filed in the
15 District Court wasn't automatically referred to this Court
16 under the standing order in effect in this district, given the
17 related bankruptcy case, the Court's prior approval of the
18 HarbourVest settlement, and the appeal in the District Court
19 of the HarbourVest settlement.

20 When we dug a little further, we found out that Movants
21 filed a civil case cover sheet accompanying the complaint in
22 the District Court. They neglected in that initial filing to
23 point out that there was any related case to the lawsuit they
24 filed.

25 Mr. Bridges fell on his sword at the contempt hearing on

1 June 8th and took complete responsibility for the oversight.
2 I commend him for not trying to argue that the bankruptcy
3 case, the HarbourVest settlement, and the District Court
4 appeal are not related cases that would require disclosure, an
5 argument that surely would have been unsupportable.

6 But as I said at the contempt hearing, I find it curious
7 that such an important issue was overlooked, an issue which
8 would have likely changed the entire trajectory of the
9 proceedings and landed the DAF lawsuit in this Court rather
10 than the District Court.

11 And this Tuesday, Your Honor, Movants filed a revised
12 civil cover sheet with the District Court. Although they
13 referenced the bankruptcy case as a related case, they didn't
14 bother to mention the appeal already pending in the District
15 Court regarding the HarbourVest settlement -- surely, a
16 related case.

17 Your Honor also asked Mr. Bridges at the June 8th hearing
18 whether it was an oversight or intentional that he didn't
19 mention 28 U.S.C. Section 1334 as a basis for jurisdiction in
20 his complaint. Mr. Bridges had no answer for Your Honor then,
21 and has given no answer now. His only comment at the hearing
22 last time was that it must have been Ms. Sbaiti that wrote it
23 because he had no recollection of it.

24 So, Your Honor, it's no surprise that Movants conveniently
25 found themselves in the District Court, which was their

1 ultimate strategy from the get go.

2 In any event, Your Honor, we have briefed the withdrawal
3 of the reference issue. A response by the Movants is due --
4 CLO Holdco and DAF is due on June 29th. And we hope the
5 District Court will decide soon thereafter whether to enforce
6 the reference.

7 While I'm happy to argue why Movants' mandatory withdrawal
8 of the reference argument is [not] persuasive, I don't think
9 it's necessary, but I do, again, want to highlight that there
10 is no private right of action under the Investment Advisers
11 Act.

12 Your Honor, it's not really relevant to today's hearing,
13 since we have argued in opposition to the motion before Your
14 Honor that resolving the issue of the Bankruptcy Court's
15 jurisdiction to adjudicate claims contained in the complaint
16 as they relate to Mr. Seery is premature at this point. The
17 January 9th and July 16th orders first require the Court to
18 determine whether a claim is colorable. It's not until this
19 Court determines if a claim is colorable that the decision on
20 where the lawsuit should be tried is relevant.

21 Having said that, Your Honor, we read the Movants' reply
22 brief very carefully and noticed in Footnote 6 that the
23 Movants state that modifying the exclusive grant of
24 jurisdiction to adjudicate any claims that pass through the
25 gate to include the language "to the extent permissible by

1 law," in the same way the Debtor modified the plan, would
2 resolve the motion. So let's look at the provision as it
3 exists in the plans.

4 Ms. Canty, if you can put up the next demonstrative,
5 please.

6 This provision provides that the Bankruptcy Court will
7 have sole and exclusive jurisdiction to determine whether a
8 claim or cause of action is colorable, and, only to the extent
9 legally permissible and provided in Article XI, shall have
10 jurisdiction to determine -- to adjudicate the underlying
11 colorable claim or cause of action.

12 The Movants request in their reply brief in Footnote 6
13 that the July 16th order be given the plan treatment. That
14 treatment: sole authority to determine colorability and
15 jurisdiction, and, to the extent legally permissible, to
16 adjudicate underlying claim, only if jurisdiction existed.

17 After reviewing the reply brief and prior to the June 8th
18 hearing, we decided that we would agree to modify both the
19 January 9th and the July 16th orders to provide that the
20 Bankruptcy Court would only have jurisdiction to adjudicate
21 claims that pass through the colorability gate to the extent
22 permissible by law.

23 Prior to the June 8th hearing, Mr. Morris and I had a
24 conversation with Mr. Bridges. We conferred about a potential
25 resolution and a proposed modification. Mr. Bridges indicated

1 they were interested in exploring a resolution and wanted to

2 --

3 MR. BRIDGES: Objection, Your Honor.

4 THE COURT: There's an objection?

5 MR. BRIDGES: Objection, Your Honor. There's a Rule
6 408 settlement discussion. He's welcome to talk about the
7 results, but he shouldn't be talking about what was -- what
8 was proposed by opposing counsel in a settlement conversation.

9 THE COURT: Okay. I overrule.

10 MR. POMERANTZ: Your Honor, this was not --

11 THE COURT: I don't think this is a 408 issue.

12 Continue.

13 MR. BRIDGES: Thank you.

14 MR. POMERANTZ: The stipulation and order which we
15 provided to counsel is attached to my declaration, which is
16 found at Document 2418, and it was filed in connection with a
17 Notice of Revised Proposed Orders that we filed at Docket
18 2417. And I would like to put up on the screen the relevant
19 paragraphs of the order that we provided to the Movants.

20 So, you see, we agreed to modify each of the orders at the
21 end to do what the plan says. The Court would only have
22 jurisdiction for claims passing through the gate if the Court
23 had jurisdiction and it was legally permissible.

24 Movants' counsel, however, responded with a mark-up that
25 went beyond -- went beyond what Movants proposed in Footnote 6

1 and sought to fundamentally change the January 9th and July
2 16th orders in ways that were not acceptable to the Debtor and
3 not even contemplated by the original motion.

4 Ms. Canty, can you put up on the screen the relevant
5 paragraphs of the response we received?

6 Specifically, Your Honor, you see at the first part they
7 wanted to provide that the only -- the order only applied to
8 claims involving injury to the Debtor, presumably as opposed
9 to alleged injuries to affiliated funds or third parties.
10 They also provided that the Court's ability to make the
11 initial colorability determination was also qualified by "to
12 the extent permissible by law" in the way that the Court --
13 that the Debtor agreed to modify the ultimate adjudication
14 jurisdiction provision.

15 Your Honor, Movants haven't even talked about this back
16 and forth. They haven't talked about their about-face. And
17 I'll leave it for Your Honor to read their Footnote 6 that
18 said it would resolve their motion, the back and forth, our
19 proposal, and now Mr. Bridges' modified, morphed arguments
20 that now point out other issues.

21 In any event, Your Honor, we made the change, and we think
22 it should resolve the motion, or at least it resolves part of
23 the motion. There can't be any argument that the Court is
24 trying to exert exclusive jurisdiction on claims that pass
25 through the gate.

1 What apparently remains from the arguments raised by the
2 Movants is the argument that the Court does not even have
3 jurisdiction to act as a gatekeeper in the first place because
4 it doesn't have jurisdiction of the underlying lawsuit. And
5 on June 8th and today, they've added a new argument, that the
6 orders impermissibly exculpate Mr. Seery and others, violate
7 their jury trial rights, and are contrary to the Fifth Circuit
8 precedent.

9 Movants claims that the orders are a jurisdictional
10 overreach, a violation of constitutional proportions, a
11 violation of due process, and inconsistent with several U.S.
12 Supreme Court cases. But, of course, they cite no cases whose
13 facts are even remotely similar to this one. Instead, they
14 are content to rely on general statements regarding bankruptcy
15 jurisdiction, how it is derived from district court
16 jurisdiction and is constitutionally limited, legal
17 propositions which are not terribly controversial or even
18 applicable to these facts.

19 There are several arguments -- I mean, there are several
20 reasons, Your Honor, why Movants' arguments fail. Initially,
21 Movants have not cited any authority, any statute, or any rule
22 which would allow this Court to revisit the January 9th and
23 July 16th orders. As I will discuss in a moment, Your Honor,
24 *Republic v. Shoaf*, a case the Court is very familiar in and
25 relied on in connection with plan confirmation, bars a

1 collateral attack on these orders under the doctrine of res
2 judicata.

3 Similarly, as the Court remarked on June 8th, the Supreme
4 Court's *Espinosa* decision, which rejected an attack based upon
5 Federal Rule of Civil Procedure 60(b)(4) to a prior order that
6 may have been unlawful, prohibits the Court from now
7 reconsidering the January 9th and July 16th orders.

8 But even if Your Honor rules that res judicata does not
9 apply, there are two independent reasons why the orders were
10 not an unlawful extension of the Court's jurisdiction. The
11 first is because the Court had jurisdiction to enter both of
12 those orders as the ability to determine the colorability of
13 claims is within the jurisdiction of the Court. The second is
14 because the orders are justified by the *Barton* doctrine.

15 Lastly, Your Honor, Movants' argument that the Court may
16 not act as a gatekeeper to determine the colorability of a
17 claim for which it may not have jurisdiction is incorrect, and
18 as Your Honor has mentioned and as Mr. Bridges unconvincingly
19 tried to distinguish, the Fifth Circuit *Villegas v. Schmidt*
20 case is a case on point and resolves that issue.

21 Turning to res judicata, Your Honor, it prevents the Court
22 from revisiting these governance orders. CLO Holdco had
23 formal notice of the Seery CEO motion and the opportunity to
24 respond. It failed to do so. It is clearly bound.

25 As reflected on Debtor's Exhibit 4, CLO Holdco is a

1 wholly-owned subsidiary of the DAF. The DAF is its sole
2 shareholder. There is no dispute about that. Importantly, at
3 the time of both the January and July orders, Grant Scott was
4 the only human being authorized to act on behalf of CLO Holdco
5 and the DAF. The DAF did not respond to the Seery CEO motion,
6 either.

7 And why is that important, Your Honor? It's because
8 Movants argue in their reply that the DAF cannot be bound by
9 res judicata because they did not receive notice of the July
10 16th order. However, Your Honor, that is not the law. Res
11 judicata binds parties to the dispute and their privies, and
12 the DAF is bound to the prior orders even though it did not
13 receive notice.

14 There are several cases, Your Honor, that stand for this
15 unremarkable proposition. First I would point Your Honor to
16 the Fifth Circuit's opinion of *Astron Industrial Associates v.*
17 *Chrysler*, found at 405 F.2d 958, a Fifth Circuit case from
18 1968. In that case, Your Honor, the Fifth Circuit held that
19 the appellant was barred by the doctrine of res judicata from
20 bringing a claim because its parent, which was its sole
21 shareholder, would have been bound by res judicata.

22 *Astron* is consistent with the 1978 Fifth Circuit case of
23 *Pollard v. Cockrell*, 578 F.2d 1002 (1978). And the Northern
24 District of Texas in 2000 case of *Bank One v. Capital*
25 *Associates*, 2000 U.S. Dist. LEXIS 11652, found that a parent

1 and a sole shareholder of an entity couldn't assert res
2 judicata as a defense when those claims could have been
3 brought against its wholly-owned subsidiary.

4 And lastly, Your Honor, the 2011 Southern District of
5 Texas case, *West v. WRH Energy Partners*, 2011 LEXIS 5183, held
6 that res judicata applied with respect to a partnership's
7 general partner because the general partner was in privity
8 with the partnership.

9 These cases are spot on and make sense. DAF is CLO
10 Holdco's parent. Grant Scott was the only live person to
11 represent these entities in any capacity at the relevant
12 times. Accordingly, just as CLO Holdco is bound, DAF is
13 bound.

14 Allowing DAF to assert a claim when its wholly-owned and
15 controlled subsidiary is barred would allow entities to
16 transfer claims amongst their related entities in order to
17 relitigate them and they would never be finality. And, of
18 course, Jim Dondero, as we know, consented to the January 9th
19 order, which provided Mr. Seery protection in a variety of
20 capacities.

21 And as Your Honor has pointed out, and as Mr. Bridges
22 didn't have an answer for, neither CLO Holdco nor the DAF or
23 any other party appealed any of the governance orders. And
24 nobody challenged the validity of these orders at the
25 confirmation hearing, where the terms of these orders were

1 front and center.

2 And importantly, Your Honor, the orders are clear and
3 unambiguous. They require a Bankruptcy Court [sic] to seek
4 Bankruptcy Court approval before they commence or pursue an
5 action against the independent board, the CEO, CRO, or their
6 agents. And they clearly and unambiguously set the standard
7 of care for actions prospectively: gross negligence or
8 willful misconduct.

9 The Bankruptcy Court had jurisdiction to enter the
10 governance orders, which, as expressly indicated in the
11 orders, were core proceedings dealing with the administration
12 of the estate. No one challenged this finding of core
13 jurisdiction. And as I will discuss later, the failure to
14 challenge core jurisdiction is waived under applicable Supreme
15 Court and Fifth Circuit precedent.

16 Your Honor, the Court [sic] does not argue that Movants
17 have waived their right to seek adjudication of a lawsuit that
18 passes through the colorability gate by an Article III Court.
19 The issue is not before the Court, but the changes to the
20 order that the Debtor agreed to make clearly -- clearly will
21 provide Mr. Bridges' clients the ability to make that
22 determination.

23 The Debtor is, however, arguing that the Movants have
24 waived their right to contest the core jurisdiction of the
25 Bankruptcy Court to make the determination that the claims are

1 colorable in the first place, and to challenge the exculpation
2 provisions provided to the beneficiaries of those orders.

3 Accordingly, Your Honor, the elements of res judicata are
4 satisfied. Both proceedings involve the same parties. The
5 prior judgment was entered by a court of competent
6 jurisdiction. The prior order was a final judgment on its
7 merits. And they involved the same causes of action.

8 Importantly, the members of the independent board,
9 including Jim Seery, relied on the protections contained in
10 the January 9th and July 16th orders and would not have
11 accepted these appointments if the protections weren't
12 included. And how do we know this? Because each of them,
13 both Mr. Seery and Mr. Dubel, both testified at the
14 confirmation hearing on this very topic.

15 And I would like to put up on the screen an excerpt from
16 Mr. Seery's testimony at confirmation, which is testimony
17 included in the February 2nd, 2021 transcript, which is
18 Exhibit 2 of the Debtor's exhibits.

19 THE COURT: Okay.

20 MR. POMERANTZ: And I would like to just read this,
21 Your Honor.

22 "Q Okay. You mentioned that there were certain
23 provisions of the January 9th order that were important
24 to you and the other independent directors. Do I have
25 that right?"

1 MR. POMERANTZ: A little bit later on, Mr. Seery
2 testifies:

3 "A And then ultimately there'll be another provision
4 in the agreement here, I don't see it off the top of my
5 head, but a gatekeeper provision. And that provision"

6 --

7 "Q Hold on one second, Mr. Seery."

8 MR. POMERANTZ: Please scroll.

9 "Q So, Paragraph 4 and 5, were those -- were those --
10 were those provisions put in there at the insistence of
11 the prospective independent directors?

12 "A Yes.

13 "Q Okay. Can we go to Paragraph 10, please? There
14 you go."

15 Mr. Morris: Is this the other provision that you were
16 referring to?

17 "A This is -- it's become to be known as the
18 gatekeeper provision, but it's a provision that I
19 actually got from other cases -- again, another very
20 litigious case -- that I thought it was appropriate to
21 bring it into this case. And the concept here is that
22 when you are dealing with parties that seem to be
23 willing to engage in decade-long litigation and
24 multiple forums, not only domestically but even
25 throughout the world, it seemed important and prudent

1 to me and a requirement that I set out that somebody
2 would have to come to this Court, the Court with
3 jurisdiction over these matters, and determine whether
4 there was a colorable claim. And that colorable claim
5 would have to show gross negligence and willful
6 misconduct -- i.e., something that would not otherwise
7 be indemnifiable" --

8 MR. POMERANTZ: Hold on one second.

9 "A So, basically, it set an exculpation standard for
10 negligence. It exculpates the directors from
11 negligence, and if somebody wants to bring a cause
12 against the directors, they have to come to this Court
13 first to get a finding that there's a colorable claim
14 for gross negligence or willful misconduct."

15 "Q Would you have accepted the engagement as an
16 independent director without the Paragraphs 4, 5, and
17 10 that we just looked at?

18 "A No, these were very specific requests. The
19 language here has been smithered, to be sure, but I
20 provided the original language for Paragraph 10 and
21 insisted on the guaranty provisions above to ensure
22 that the indemnity would have some support.

23 "Q And ultimately did the Committee and the Debtor
24 agree to provide all the protections afforded by
25 Paragraphs 4, 5, and 10?

1 "A Yes."

2 MR. POMERANTZ: So, Your Honor, these -- this
3 testimony also applied to as well as the CEO.

4 The testimony was echoed by Mr. Dubel, another member of
5 the board. And I'm not going to put his testimony on the
6 screen, but it can be found at Pages 272 to 281 of Exhibit 2,
7 which is the February 2nd transcript.

8 Movants argue, however, that res judicata doesn't apply
9 because the Court didn't have jurisdiction to enter these
10 orders. And they argue that the order stripped the District
11 Court of this jurisdiction. As I previously described, the
12 Debtor is prepared to modify the governance orders to provide
13 that the Court shall retain jurisdiction to -- on claims that
14 pass through the gate only to the extent legally permissible.
15 The modification does not appear to be good enough for the
16 Movants. They continue to argue that the Bankruptcy Court
17 can't even act as the exclusive gatekeeper to determine
18 whether such actions are colorable as a prerequisite for
19 commencing or pursuing an action.

20 The problem Movants run into is the Fifth Circuit's
21 opinion of *Republic v. Shoaf* and various Supreme Court
22 decisions, including *Espinosa*.

23 In *Shoaf*, the Fifth Circuit held that a party cannot
24 subsequently challenge a confirmed plan that clearly and
25 unambiguously released a third party, even if the Bankruptcy

1 Court lacked jurisdiction to approve the release in the first
2 place. Movants' proper recourse was to appeal the governance
3 orders, not to seek to collaterally attack them.

4 In *Shoaf*, the Fifth Circuit held that the confirmed plan
5 was res judicata with respect to a suit by the creditor
6 against the guarantor. And in so ruling, the Fifth Circuit
7 says that the prong of res judicata standard that requires an
8 order, prior order to be made by a court of competent
9 jurisdiction is satisfied regardless of whether the issue was
10 actually litigated. This is because whenever a court enters
11 an order, it does so by implicitly making a finding of its
12 jurisdiction, a determination that can't be attacked. And in
13 fact, in the January 9th and the July 16th orders, it wasn't
14 implicit, the Court's jurisdiction; it was set out that the
15 Court had core jurisdiction.

16 Movants try to brush *Shoaf* aside, arguing that is the only
17 case the Debtor cites to support res judicata argument and is
18 a narrow opinion that has been questioned and distinguished.
19 That's just not correct, Your Honor. Movants ignore that we
20 have cited two United States Supreme Court cases, *Stoll v.*
21 *Gottleib* and *Chicot County Drainage District*, upon which the
22 Fifth Circuit based its *Shoaf* decision. In each case, the
23 U.S. Supreme Court gave res judicata effect to a Bankruptcy
24 Court order that made a ruling party -- that a ruling party
25 later claimed was beyond the Court's jurisdiction to do so.

1 In *Stoll*, it was a release of guaranty without jurisdiction,
2 like *Shoaf*. In *Chicot*, it was an extinguishment of a bond
3 claim without jurisdiction.

4 Similarly, Your Honor, the U.S. Supreme Court held in
5 *Espinosa* that a party was not entitled to reconsideration of a
6 Bankruptcy Court order under Federal Rule of Civil Procedure
7 60(b) (4) discharging a student loan without making the
8 required statutory finding of undue hardship in an adversary
9 proceeding. And the Supreme Court reasoned in that opinion as
10 follows: A judgment is not void, for example, simply because
11 it may have been erroneous. Similarly, a motion under
12 60(b) (4) is not a substitute for a timely appeal. Instead,
13 60(b) (4) applies only in the rare instance where a judgment is
14 premised either on a certain type of jurisdictional error or a
15 violation of due process that deprives a party of notice or
16 the opportunity to be heard.

17 Federal courts considering Rule 60(b) (4) motions that
18 assert a judgment is void because of a jurisdictional defect
19 generally have reserved it only for the exceptional case in
20 which the court that rendered the judgment lacked even an
21 arguable basis for jurisdiction. This case is not the
22 exceptional -- exceptional circumstance that was referred to
23 by *Espinosa*.

24 In addition, we argue in our brief, and I'll get to in a
25 few moments, that both of the orders are justified under the

1 Barton doctrine.

2 Actually, before I go to that, Your Honor, I think Movants
3 are really trying to distinguish *Espinosa* by arguing that the
4 Court's order exculpating Mr. Seery for negligence liability
5 did not provide people, mom-and-pop investors, with the due
6 process informing them that they would not be able to assert
7 duty claims based upon mere negligence. I think that's the
8 core of Mr. Bridges' argument, that, hey, you entered an
9 order, you gave this exculpation, it was inappropriate, and it
10 couldn't be done.

11 There are several problems with Movants' argument. First,
12 Movants mischaracterize both the facts and the law in
13 connection with the Debtor's relationship with its investors.
14 The Debtor is the registered investment advisor for HCLOF as
15 well as approximately 15 to 18 CLOs. The only investor in
16 HCLOF other than the Debtor is CLO Holdco. The investors in
17 the CLOs are the retail funds advised by the Dondero advisors
18 and the other -- and other institutional investors.
19 Accordingly, the thousands of investors, the mom-and-pop
20 investors whose due process rights have allegedly been
21 trampled by the January 9th and July 16th orders, are not
22 investors in any funds managed by the Debtor.

23 And, of course, I have mentioned, as I've mentioned
24 before, no non -- non-Dondero investor, be it a mom-and-pop
25 investor, another institutional investor, anyone unrelated to

1 Mr. Dondero, has ever appeared in this Court to challenge the
2 Debtor's activities.

3 But more fundamentally, Your Honor, the Debtor does not
4 owe fiduciary duties to investors in any of the funds that the
5 Debtor advises. The fiduciary duty that the Debtor owes is to
6 the funds themselves, not the investors in the funds.

7 And while Movants point to Mr. Seery's prior testimony to
8 support the argument that the Debtor owes a duty to investors,
9 Mr. Seery was not testifying as a lawyer and his testimony
10 just cannot change the law.

11 As to each of the funds that the Debtor manages, HCLOF and
12 the CLOs, they were each provided with actual notice of the
13 January 16th -- the July 16th order and didn't object. And as
14 Your Honor will recall, the Trustees for the CLOs, the party
15 that could potentially have claims for breach of fiduciary
16 duty, they participated in the January 9th hearing. They came
17 to the Court and were concerned about the protocols that the
18 Debtor was agreeing to with the Committee. We revised them.
19 The Trustees didn't object. They didn't object then; they
20 didn't object now. And, in fact, they consented to the
21 assumption of the contracts between the Debtor and the CLOs.

22 So the argument that the orders, by having this
23 exculpation for future conduct, violated due process rights of
24 anyone and is the type -- essentially, the type of order that
25 *Espinosa* would have contemplated could be attacked, is --

1 relies on faulty legal and factual premises. No duty to
2 investors. No private right of action. And both -- and all
3 the funds received due process.

4 In addition, Your Honor, as we argue in our brief and I'll
5 get to in a few moments, both of the orders are justified
6 under the *Barton* doctrine, as Mr. Seery is entitled to
7 protection based upon how courts around the country have
8 interpreted the *Barton* doctrine. As such, Mr. Seery is
9 performing his role both as an agent of the independent board
10 under the January 9th order, as a CEO under the July 16th
11 order, as a quasi-judicial officer. And as Your Honor
12 examined in the *Ondova* opinion which you mentioned, trustees
13 are entitled to qualified immunity for damage to third parties
14 resulting from simple negligence, provided that the trustee is
15 operating within the scope of his duties and is not acting in
16 an *ultra vires* manner.

17 So, exculpating the independent directors, their agents,
18 and the CEO in the January 9th and July 16th orders was a
19 recognition by this Court that they would be entitled to
20 qualified immunity, much in the same way trustees are.

21 No doubt that Movants contend that this was error and that
22 the Court overreached. However, the remedy for that overreach
23 was an appeal, not a reconsideration 16 months later. The
24 Court's orders based upon the determination that in this
25 highly contentious case that these court officers needed to be

1 protected from negligence suits is not the exceptional case
2 where the Court lacked any arguable basis for jurisdiction.
3 Accordingly, this Court must follow *Espinosa, Shoaf, Stoll,*
4 and *Chicot* and reject the attack on the prior court orders.

5 The only case Movants cite to challenge the Supreme
6 Court's decision -- to challenge the Supreme Court precedent I
7 mentioned and the Fifth Circuit's *Shoaf* decision is the
8 *Applewood* case. *Applewood* is totally consistent with *Shoaf*.
9 *Applewood* also involved a plan that purported to release a
10 guaranty claim that the guarantor argued was res judicata in
11 subsequent litigation regarding the guaranty. The Fifth
12 Circuit held in that case that the plan was not res judicata.
13 It made that ruling because the plan did not contain clear and
14 unambiguous language releasing the guaranty. In that way, the
15 Fifth Circuit distinguished *Shoaf*.

16 *Applewood* and *Shoaf* are consistent. A Bankruptcy Court
17 order will be given res judicata effect, even if the Court
18 didn't have jurisdiction to enter it, if the order was clear
19 and unambiguous. In *Shoaf*, the release was. In *Applewood*, it
20 wasn't.

21 Movants argued on June 8th and argue now that the
22 *Applewood* case really argues -- really deals with prospective
23 exculpation of claims. I went back and read Mr. Bridges'
24 comments carefully of June 8th. He said *Applewood*,
25 exculpation. Well, that's just not correct. *Applewood* is all

1 about requiring specificity of a (garbled) to give it res
2 judicata effect. Claims that existed at that time, were they
3 described clearly and unambiguously? Yes? *Shoaf* applies.
4 No? *Applewood* does -- applies.

5 So how should the Court apply these principles here? The
6 Court approved a procedure for certain claims in the
7 governance orders. The procedure: come to Bankruptcy Court
8 before pursuing a claim against the independent directors and
9 Seery or their agents so that the Court can make a
10 colorability determination. Clear and unambiguous. The
11 governance orders each provide that the Bankruptcy Court had
12 jurisdiction to enter the orders, and the orders were not
13 appealed.

14 Movants attempt to confuse the Court and argue *Applewood*
15 is on point because the January 9th and July 16th orders do
16 not clearly identify specific claims that Movants now have
17 that are being released. And because they're not specific,
18 then basically it's an ambiguous release and *Applewood*
19 applies.

20 The problem with the Movants' argument is that neither the
21 January 9th or July 16th orders released claims that existed
22 at that time. If they did, and if there wasn't an adequate
23 description, I might agree with Mr. Bridges that *Applewood*
24 applied. But there were no claims. It was prospective. It
25 was a standard of care. The Court clearly and unambiguously

1 said what the standard of care would be going forward.
2 Clearly, under *Shoaf* and Supreme Court precedent, they are
3 entitled to res judicata because it's a clear and unambiguous
4 provision. *Applewood* just simply doesn't apply.

5 Mr. Phillips at the last hearing made an impassioned plea
6 to the Court for a narrow interpretation of the exculpation
7 provisions in the January 9th and July 16th orders, and he
8 argued that the Court could not possibly have intended for the
9 exculpation for negligence to apply on a go forward basis. He
10 thus argued to the Court that the Court should construe the
11 exculpation narrowly and only apply it to potential claims of
12 harm caused to the Debtor, as opposed to harm caused to third
13 parties, which he said included thousands of innocent
14 investors.

15 Of course, Mr. Phillips made those arguments unburdened by
16 the actual facts and the prior proceedings which led to the
17 entry of these orders, because, as he was the first to admit,
18 he only became involved in the case a month ago.

19 As the Court recalls, and as reinforced by Mr. Seery's and
20 Mr. Dubel's testimony I just mentioned, the exculpation
21 provisions were included precisely to prevent Mr. Dondero,
22 through any one of the entities he's owned and controlled, the
23 Movants being two of those, from asserting baseless claims
24 against the beneficiaries of those orders, exactly the
25 situation Mr. Seery now finds himself in.

1 And, again, it bears emphasizing: throughout this case,
2 not one of the purported public investors Mr. Phillips
3 lamented would be prevented from holding Mr. Seery responsible
4 for his conduct has ever appeared in this case to object about
5 anything. And none of the directors of the funds, the funds
6 where the Debtor acts as an investment adviser, have ever
7 stepped foot in this court, either.

8 Even if the Court declines to apply res judicata, Your
9 Honor, to prevent challenges to the governance orders, the
10 Court has the jurisdiction, had the jurisdiction to include
11 the gatekeeping provisions in those orders. The Bankruptcy
12 Court derives its jurisdiction from 28 U.S.C. Section 157, and
13 bankruptcy jurisdiction is divided into two parts: core
14 matters, which are those arising in or arising under Title 11,
15 and noncore matters, those matters which are related to a
16 Chapter 11 case.

17 Bankruptcy Courts may enter final orders in core
18 proceedings, and with the consent of parties, noncore
19 proceedings. If a party does not consent to a final judgment
20 in the noncore matters or waives its right to consent, then
21 the Bankruptcy Court -- or does not waive its right to
22 consent, then the Bankruptcy Court issues a report and
23 recommendation to the District Court.

24 The seminal Fifth Circuit case on bankruptcy court
25 jurisdiction is the 1987 case of *Wood v. Wood*, 825 F.2d 90.

1 There, the Fifth Circuit held that the Bankruptcy Court has
2 related to jurisdiction over matters if the outcome of that
3 proceeding could conceivably have any effect on the estate
4 being administered in the bankruptcy.

5 More recently, the Fifth Circuit, in the 2005 case, in
6 *Stonebridge Tech's*, elaborated on when a matter has a
7 conceivable effect on the estate such as to confer Bankruptcy
8 Court jurisdiction. There, the Fifth Circuit held that an
9 action is related to bankruptcy if the outcome could alter the
10 debtor's rights, liabilities, options, or freedom of action,
11 either positively or negatively, and which in any way impacts
12 upon the handling and the administration of the bankruptcy
13 estate. It is against this backdrop, Your Honor, that the
14 Court should evaluate its jurisdiction to have entered the
15 orders.

16 So, again, what did the orders do? They established
17 governance over the Chapter 11 debtor with new independent
18 directors being approved. They established the procedures and
19 protocols of how transactions were going to be presented to
20 and approved by the Committee. They vested in the Committee
21 certain related-party claims, and they provided for the
22 procedures parties would have to follow to assert any claims
23 against the independent directors and the CRO and the agents
24 and advisors.

25 Your Honor, it's hard to imagine that there is a more core

1 order than the entry of these orders. At the time the orders
2 were entered, the Court was well aware of the potential for
3 acrimony from Mr. Dondero and his related entities, and
4 included the gatekeeper provisions to prevent the Debtor's
5 estate from being embroiled in frivolous litigation against
6 the board and the CEO.

7 Such protections were clearly within the Court's
8 jurisdiction, both to protect the administration of the estate
9 but also under applicable Fifth Circuit law dealing with
10 vexatious litigants, as set forth in the *Baum* and *Carroll*
11 cases that the Court cited in its confirmation order.

12 Not that it was hard to predict, but the last several
13 months have reinforced how important the gatekeeping
14 provisions in the order are and how important similar
15 provisions in the plan are.

16 The Court heard extensive testimony at the confirmation
17 hearing regarding the havoc continued litigation by Mr.
18 Dondero and his related entities would cause, which
19 predictions have unfortunately been borne out by the
20 unprecedented blizzard of litigation involving Mr. Dondero and
21 his related entities that has consumed the Court over the last
22 several months and caused the estate to incur millions of
23 dollars in fees that could have been used to pay its
24 creditors.

25 And these attacks are continuing. As I mentioned before,

1 in addition to the DAF lawsuit, Sbaiti & Co. filed an action
2 against the Debtor on behalf of PCMG, another related entity,
3 alleging postpetition mismanagement of the Select Fund.

4 And to complete the hat trick, they are the lawyers
5 seeking to sue Acis in the Southern District of New York for
6 allegedly post-confirmation matters.

7 The Court knew then and certainly knows now that the
8 potential for sizable indemnification claims could consume the
9 estate. The Court used that as the potential basis for
10 determining that the orders were within its jurisdiction, just
11 as it used that potential to justify the exculpation
12 provisions in the plan as being consistent with *Pacific*
13 *Lumber*.

14 Movants also ignore the cases -- and we cited in our
15 opposition -- where courts in this district, including Judge
16 Lynn in *Pilgrim's Pride* in 2010 and Judge Houser in the *CHC*
17 *Group* in 2016, approved gatekeeper provisions that provided
18 the Bankruptcy Court with exclusive jurisdiction to adjudicate
19 claims against postpetition fiduciaries.

20 Movants also ignore cases outside this district, including
21 *General Motors* and *Madoff*, which we cited in our brief as
22 examples of cases where Bankruptcy Courts have been used as
23 gatekeepers to determine if claims are colorable or being
24 asserted against the correct entity.

25 And there's another reason, Your Honor, why Movants may

1 now not contest the Court's jurisdiction to have entered those
2 orders. Each of those orders, as I said before, include a
3 finding that the Court had core jurisdiction to enter the
4 orders. No party contested that finding or refused to consent
5 to the core jurisdiction.

6 Under well-established Supreme Court precedent, parties
7 can waive their right to challenge the Bankruptcy Court's
8 jurisdiction, core jurisdiction, by failing to object. In
9 *Wellness v. Sharif* in 2015, the Supreme Court expressly held
10 that Article III was not violated if parties knowingly and
11 voluntarily consented to adjudication of *Stern v. Marshall*-
12 type alter ego claims, and that the consent need not be
13 express, so long as it was knowing and voluntary.

14 And *Wellness* confirmed the pre-*Stern* opinion of the Fifth
15 Circuit in the 1995 *McFarland* case, which held that a person
16 who fails to object to the Bankruptcy Court's assumption of
17 core jurisdiction is deemed to have consented to the entry of
18 a final order by the Bankruptcy Court.

19 Your Honor, I'd now like to turn to the *Barton* doctrine.
20 The Court also has jurisdiction to have entered the orders
21 based upon the *Barton* doctrine. The *Barton* doctrine dates
22 back to an old United States Supreme Court case and provides
23 as a general rule that, before a suit may be brought against a
24 trustee, consent from the appointing court must be obtained.

25 Movants essentially make two arguments why the *Barton*

1 doctrine doesn't apply.

2 First, Movants, without citing any authority, argue that
3 it does not apply to Mr. Seery because he is not a trustee or
4 receiver and was not appointed by the Court. Although the
5 doctrine was originally applied to receivers, it has been
6 extended over time to cover various court-appointed
7 fiduciaries and their agents in bankruptcy cases, including
8 debtors in possession, officers and directors of the debtor,
9 and the general partner of the debtor. And although Mr.
10 Bridges says he couldn't find one case that applied the *Barton*
11 doctrine to a court-retained professional, I will now talk
12 about several such cases.

13 In *Helmer v. Pogue*, a 2012 case cited in our brief, the
14 District Court for the Northern District of Alabama
15 extensively analyzed the *Barton* doctrine jurisprudence from
16 the Eleventh Circuit and beyond and concluded that it applied
17 to debtors in possession. The *Helmer* Court relied in part on
18 a prior 2000 decision of the Eleventh Circuit in *Carter v.*
19 *Rodgers*, which held that the doctrine applies to both court-
20 appointed and court-approved officers of the debtor, which is
21 consistent with the law in other circuits.

22 And subsequently, the Eleventh Circuit again considered --
23 and in that case, the distinction of a court-appointed as a
24 court-retained professional was -- was not persuasive to the
25 Court, and the Court held that a court-retained professional

1 can still have *Barton* protection, notwithstanding that he
2 wasn't appointed, the argument that Mr. Bridges tries to make.

3 And subsequently, --

4 THE COURT: I wonder, was that -- was that Judge
5 Clifton Jessup, by chance? Or maybe Bennett?

6 MR. POMERANTZ: Your Honor, this was -- this was the
7 Eleventh Circuit *Carter v. Rodgers*, so I think Judge Jessup
8 was --

9 THE COURT: Oh, I thought you were still talking
10 about the Alabama case. No?

11 MR. POMERANTZ: Yeah, the Alabama -- well, the
12 Alabama case referred to the Eleventh Circuit case, *Carter v.*
13 *Rodgers*, --

14 THE COURT: Okay.

15 MR. POMERANTZ: -- and the appointment and -- or
16 retention issue was discussed in the *Carter v. Rodgers* case.

17 THE COURT: Okay.

18 MR. POMERANTZ: And subsequently, the Eleventh
19 Circuit again considered the contours of the *Barton* doctrine
20 in *CDC Corp.*, a 2015 case, 2015 U.S. App. LEXIS 9718. In that
21 case, which Your Honor referenced in your *Ondova* opinion,
22 which I will discuss in a few moments, the Eleventh Circuit
23 held that a debtor's general counsel who had been approved by
24 the Court, who was appointed by a chief restructuring officer
25 who was also approved by the Court, was covered by the *Barton*

1 doctrine for acts taken in furtherance of the administration
2 of the estate and the liquidation of the assets.

3 And the Eleventh Circuit last year, in *Tufts v. Hay*, 977
4 F.3d 204, reaffirmed that court-approved counsel who function
5 as the equivalent of court-appointed officers are entitled to
6 protection under *Barton*. While the Court in that case
7 ultimately ruled that counsel could be sued without first
8 going to the Bankruptcy Court, it did so because it determined
9 that the suit between two sets of lawyers would not have any
10 effect on the administration of the estate.

11 So, Your Honor, not only is there authority, there is
12 overwhelming authority that Mr. Seery is entitled to the
13 protections.

14 In *Gordon v. Nick*, a District -- a case from 1998 from the
15 Fourth Circuit, the Court that the *Barton* doctrine applied to
16 a lawsuit against a general partner who was responsible for
17 administering the bankruptcy estate.

18 And as I mentioned, Your Honor, and as Your Honor
19 mentioned, Your Honor had reason to look at the *Barton*
20 doctrine in length and in depth in the 2017 *Ondova* opinion.
21 And in the course of the opinion, Your Honor discussed one of
22 the policy rationales for the doctrine, which you took from
23 the Seventh Circuit's *Linton* opinion, and you said as follows:
24 "Finally, another policy concern underlying the doctrine is a
25 concern for the overall integrity of the bankruptcy process

1 and the threat of trustees being distracted from or
2 intimidated from doing their jobs. For example, losers in the
3 bankruptcy process might turn to other courts to try to become
4 winners there by alleging the trustee did a negligent job."

5 Here, the independent board was approved by the Court as
6 an alternative to the appointment of a Chapter 11 trustee.
7 And it and its agent, including Mr. Seery as the CEO, even
8 before the July 16th order, were provided protections in the
9 form of the gatekeeper order and exculpation.

10 I'm sure the Court has a good recollection of the January
11 9th hearing -- we've talked about it a lot in the proceedings
12 before Your Honor -- where the Debtor and the Committee
13 presented the governance resolution to Your Honor. And as
14 Your Honor will recall, the appointment of the board was a
15 hotly-contested issue among the Debtor and the Committee and
16 was heavily negotiated. And the appointment of the
17 independent board was even contested by the United States
18 Trustee at a hearing on January 20th, 2020.

19 I refer the Court to the transcripts of the hearings on
20 January 9th and January 20th of 2020, which clearly
21 demonstrate that appointing this board and giving it the
22 rights and protections and its agents the rights and
23 protections was not your typical corporate governance issue,
24 but it was essentially the Court's alternative to appointing a
25 trustee. And recognizing that the members of the independent

1 board were essentially officers of the Court, the Court
2 approved the gatekeeper provision, requiring parties first to
3 come and seek the Court's permission before suing them, in
4 order to prevent them from being harassed by frivolous
5 litigation.

6 And the independent board was given the responsibility in
7 the January 9th order to retain a CEO it deemed appropriate,
8 and it did so by retaining Mr. Seery.

9 Recognizing the *Barton* doctrine as it applies to Mr. Seery
10 is consistent with a legion of cases throughout the United
11 States, and Movants' argument that Mr. Seery is not court-
12 appointed is just wrong.

13 Second, Your Honor, Movants cite without any authority,
14 argue that even if the *Barton* doctrine applied there is an
15 exception which would allow it to pursue a claim against Mr.
16 Seery without leave of the Court.

17 The Debtor agrees the 28 U.S.C. § 959 is an exception to
18 the *Barton* doctrine. Section 959(a) provides that trustees,
19 receivers, or managers of any property, including debtors in
20 possession, may be sued without leave of the court appointing
21 them with respect to any of their acts or transactions in
22 carrying on business connected with such property.

23 As the Court also pointed out at the June 8th hearing, and
24 Mr. Bridges alluded to in his argument, the last sentence of
25 959(a) provides that such actions -- clearly referring to

1 actions that may be pursued without leave of the appointing
2 court -- shall be subject to the general equity power of such
3 court, so far as the same may be necessary to the ends of
4 justice.

5 And Mr. Bridges made a plea, saying you can't take away my
6 jury trial right there. You just cannot do that. Well, I
7 have two answers to that, Your Honor. One, they relinquished
8 their jury trial right. We've established that. Okay?

9 The second is allowing Your Honor to act as a gatekeeper
10 has nothing to do with their jury trial right. Allowing Your
11 Honor to act as a gatekeeper allows you to determine whether
12 the action could go forward, and it'll either go forward in
13 Your Honor's court or some other court.

14 And the argument that the exculpation was essentially a
15 violation of 959 is just -- is just -- it just is twisting
16 what happened. You have an exculpation provision. We already
17 went through the authority the Court had to give an
18 exculpation. With respect to these litigants who are before
19 Your Honor -- we're not talking about anyone else who's coming
20 in to try to get relief from the order; we're talking about
21 these litigants -- we've already established that they were
22 here, they're bound by res judicata. So their 959 argument
23 goes away.

24 And as the Court -- and separate and apart from that, the
25 issue at issue in the District Court litigation is -- is not

1 even subject to 959.

2 Mr. Bridges says, well, of course it is because it deals
3 with the administration of the estate. I'd like to refer to
4 what the Court said -- this Court said in its *Ondova* opinion:
5 The exception generally applies to situations in which the
6 trustee is operating a business and some stranger to the
7 bankruptcy process might be harmed, such as a negligence claim
8 in a slip-and-fall case, and is inapplicable to suits based
9 upon actions taken to further the administering or liquidating
10 the bankruptcy estate.

11 And your *Ondova* opinion is consistent with the Third and
12 Eleventh Circuit opinions Your Honor cited in your opinion, as
13 well as numerous other --

14 (Interruption.)

15 MR. POMERANTZ: -- from the -- from around the
16 country, including cases from the First, Second, Sixth,
17 Seventh, and Ninth Circuits. And I'm not going to give all
18 the cites to those cases, but it's not a -- it's not a
19 remarkable proposition that Your Honor relied on in *Ondova*.

20 In addition, several of these cases, including the
21 Eleventh Circuit's *Carter* opinion, have been cited with
22 approval by the Fifth Circuit in *National Business Association*
23 v. *Lightfoot*, a 2008 unpublished opinion for this very point.
24 The *Barton* exception of 959 does not apply to actions taken in
25 the administration of the case and the liquidation of assets

1 in the estate.

2 Suffice it to say that it's clear that the Section 959
3 exception to *Barton* has no applicability in this case.

4 Movants, hardly strangers to the bankruptcy case, want to sue
5 Mr. Seery for acts taken relating to a settlement of very
6 complex and significant claims against the estate. They want
7 to sue a court-appointed fiduciary for doing his job,
8 resolving claims against the estate and his management of the
9 bankruptcy estate. And they want to do this outside of the
10 Bankruptcy Court.

11 Settlement of the HarbourVest claim, which is where this
12 claim arises under -- whether it's a collateral attack now or
13 not, and we say it is, is for another issue -- but it clearly
14 arises in the context of settlement of the HarbourVest claim,
15 is the quintessential act to further the administration and
16 liquidation of the bankruptcy estate, and certainly doesn't
17 fall within the 959 exception.

18 Movants seem to be arguing that 959(a) makes a distinction
19 between claims against Mr. Seery that damaged the Debtor and
20 claims against Mr. Seery that damaged third parties. However,
21 the Movants make up that distinction, and it's not in the
22 statute, it's not in the case law. The focus is not on who
23 the conduct damages, but it's rather on whether the conduct
24 was taken in connection with the administration or the
25 liquidation of the estate.

1 And even if the Debtor is wrong, Your Honor, which it's
2 not, the savings clause allows the Court to determine whether
3 leave to be -- sue will be granted. Given that these claims
4 are asserted by Dondero-related entities, if not controlled
5 entities, no serious argument exists that the equities do not
6 permit this Court to determine if leave to sue is appropriate.

7 Accordingly, Movants' argument that the orders create this
8 tension with 959 is simply an over-dramatization. And in any
9 event, Your Honor, there's a basis independent of *Barton* that
10 supports the jurisdiction to enter the orders, as I mentioned.

11 But even if the orders only relied on *Barton*, there is an
12 easy fix to Movants' concerns: let them come to court and
13 argue that the type of suit they are bringing allegedly falls
14 within the exception of 959.

15 Your Honor, Movants argue that the Bankruptcy Court may
16 not act as a gatekeeper if it would not have jurisdiction to
17 deal with the underlying action. They essentially argue that
18 an Article I judge may not pass on the colorability of a
19 claim, that it should be decided by an Article III judge.
20 This is the same argument, Your Honor, that Your Honor
21 rejected in connection with plan confirmation and which I
22 touched on earlier.

23 And the reason why Your Honor rejected it is because
24 there's no law to support it. In fact, there is Fifth Circuit
25 law that holds to the contrary. And we talked about a little

1 bit the Fifth Circuit case decided is *Villegas v. Schmidt* in
2 2015. And *Villegas* is a simple case. Schmidt was appointed
3 trustee over a debtor and liquidated its estate and the
4 Bankruptcy Court approved his final fees. Four years later,
5 Villegas and the prior debtor sued Schmidt in District Court,
6 the district in which the Bankruptcy Court was pending,
7 arguing that he was negligent in the performance of his
8 duties. The District Court dismissed the case because
9 Villegas failed to obtain Bankruptcy Court approval to bring
10 the suit under the *Barton* doctrine.

11 On appeal, Villegas argued *Barton* didn't apply for two
12 reasons. First, that *Stern v. Marshall* created an exception
13 to the *Barton* doctrine for claims that the Bankruptcy Court
14 would not have the jurisdiction to adjudicate. And second,
15 that *Barton* did not apply if the suit is brought in the
16 District Court, which exercises supervisory authority over the
17 Bankruptcy Court that appointed the trustee. Pretty much the
18 argument that was made by Movants at the contempt hearing.

19 The Fifth Circuit rejected both arguments. It held that
20 the existence of a *Stern* claim does not impact the Bankruptcy
21 Court's authority because *Stern* did not overrule *Barton* and
22 the Supreme Court had cautioned circuit courts against
23 interpreting later cases as impliedly overruling prior cases.

24 More importantly, the Fifth Circuit pointed to a post-
25 *Stern* 2014 case, *Executive Benefits v. Arkison*, 573 U.S. 25

1 (2014), which held that *Stern* does not decide how a Bankruptcy
2 Court or District Courts should proceed when a *Stern* creditor
3 is identified, as support for the argument that *Barton* is
4 still good law, even dealing with a *Stern* claim.

5 Second, the Fifth Circuit, joining every circuit to have
6 addressed the issue, ruled that the District Court and the
7 Bankruptcy Court are distinct from one another and the
8 Bankruptcy Court has the exclusive authority to determine the
9 colorability of *Barton* claims and that the supervisory
10 District Court does not.

11 Movants didn't address *Villegas* in their reply. Briefly
12 tried to distinguish it, unconvincingly, today. The bottom
13 line is *Villegas* is directly applicable. Your Honor cited it
14 in the *Ondova* opinion for precisely the proposition that
15 *Barton* applies whether or not the Court has authority to
16 adjudicate the claim.

17 Accordingly, Your Honor, it was within the Court's
18 jurisdiction to require a party to seek approval of Your Honor
19 on the colorability of a claim before an action may be
20 commenced or pursued against the protected parties, even if
21 Your Honor wouldn't have authority to adjudicate the claim at
22 the end of the day.

23 In fact, some courts have even addressed the proper
24 procedure for doing so, requiring the putative plaintiff to
25 not only seek leave of Bankruptcy Court but also to provide a

1 draft complaint and a basis for the Court to determine if the
2 claim is colorable.

3 Movants have done neither, and they should not be
4 permitted to modify the final orders of the Court as a
5 workaround.

6 Your Honor, that concludes my presentation. I'm happy to
7 answer any questions Your Honor may have.

8 THE COURT: All right. Not at this time. All right.
9 I'm going to figure out, do we need a break or not, depending
10 on what Mr. Bridges tells me. I assume we're just doing this
11 on argument today. I think that's what I heard. No witnesses
12 or exhibits.

13 MR. BRIDGES: That is correct, Your Honor.

14 THE COURT: Okay. Mr. Bridges, how long do you
15 expect your rebuttal to take so I can figure out does the
16 Court need a break?

17 MR. BRIDGES: Fifteen minutes plus whatever it takes
18 to submit agreed-to exhibits.

19 THE COURT: Okay. Let's take a five-minute bathroom
20 break. We'll come back. It's -- what time is it? It's 1:11
21 Central time. We'll come back in five minutes.

22 THE CLERK: All rise.

23 (A recess ensued from 1:11 p.m. until 1:17 p.m.)

24 THE CLERK: All rise.

25 THE COURT: All right. Please be seated. We're

1 going back on the record in the Highland matters.

2 Mr. Bridges, time for your rebuttal. I want to ask you a
3 question right off the bat. Mr. Pomerantz pointed out
4 something that was on my list that I forgot to ask you when
5 you made your initial presentation. What is the authority
6 you're relying on? You did not cite a statute or a rule *per*
7 *se*, but I guess we can probably all agree that Bankruptcy Rule
8 9024 and Federal Rule 60 is the authority that would govern
9 your motion, correct?

10 MR. BRIDGES: I don't agree, Your Honor. I don't
11 believe this is a final order that we're contesting here. And
12 I think that's demonstrated by the Court's final confirmation
13 -- plan -- plan confirmation order that seeks to modify this
14 order or will modify this order upon being -- being effective.
15 So I don't think so.

16 In the alternative, if we are challenging a final order,
17 then I think you're right as to the rules that would be
18 controlling.

19 THE COURT: All right. Well, let me back up. Why
20 exactly do you say this would be an interlocutory order as
21 opposed to a final order?

22 MR. BRIDGES: Because of its nature, Your Honor.
23 While the appointment in the order or the approval of the
24 appointment in the order might, as a separate component of the
25 order, have -- have finality, the provisions -- the provisions

1 in it relating to gatekeeping and exculpation are, we think,
2 by their very nature, quite obviously interlocutory and not
3 permanent. They don't seem to indicate an intention by any of
4 the parties that, 30 years from now, if Mr. Seery is still CEO
5 at Highland, long after the bankruptcy case has ended, that
6 nonetheless parties would be prohibited from bringing claims,
7 strangers to this action would be prohibited from bringing
8 claims related to his CEO role.

9 I think the nature of it demonstrates that, the
10 modifications to it, and even the inclusion of it in the final
11 plan confirmation, as well as -- can't read that.

12 THE COURT: Can you give me some authority? Because
13 as we know, there's a lot of authority out there in the
14 bankruptcy universe on what discrete orders are interlocutory
15 in nature that a bankruptcy judge might routinely enter and
16 which ones are final. You know, it would just probably, if I
17 flipped open *Collier's*, I could -- you know, it would be mind-
18 numbing.

19 So what authority can you rely on? I mean, is there any
20 authority that says an employment order is not a final order?
21 That would be shocking to me if you have cases to that effect,
22 but, I mean, of course, sometimes we do interim on short
23 notice and then final. But this would be shocking to me if
24 there is case authority to support the argument this is not a
25 final order. But I learn something new every day, so maybe I

1 would be shocked and there is.

2 MR. BRIDGES: Your Honor, I'd point you to *In re*
3 *Smyth*, 207 F.3d 758, and *In re Royal Manor*, 525 B.K. 338
4 [sic], for the proposition that retaining a bankruptcy
5 professional is an interlocutory order.

6 THE COURT: Okay. Stop for a moment. The *Smyth*
7 case. Which court is that?

8 MR. BRIDGES: Fifth Circuit.

9 THE COURT: Okay. So tell me the facts. I'm
10 surprised I don't know about this case. But, again, I don't
11 know every case. So, it held that an employment order is an
12 interlocutory order?

13 MR. BRIDGES: Appointing counsel. A professional in
14 the bankruptcy context, Your Honor.

15 THE COURT: Counsel for a debtor-in-possession? An
16 order approving counsel was an interlocutory order?

17 MR. BRIDGES: Yes, or the Trustee's counsel.

18 THE COURT: Or the Trustee's counsel? Okay. What
19 were the circumstances? Was this on an expedited basis and
20 there wasn't a follow-up final order, or what?

21 MR. BRIDGES: Your Honor, I don't have -- I don't
22 have that at the tip of my memory. I'm sorry.

23 THE COURT: Okay. And the other one, 525 B.R. 338,
24 what court was that?

25 MR. BRIDGES: It's a Bankruptcy Court within the

1 Sixth Circuit. I'm not certain which district.

2 THE COURT: All right. Well, maybe one of you two
3 over there can look them up and give me the context, because
4 that is surprising authority. Or other lawyers on the WebEx
5 maybe can do some quickie research.

6 Okay. We'll come back to that. But assuming that this
7 was a final order, which I have just been presuming it was,
8 Rule 60 is the authority you're going under? 9024 and Rule
9 60, correct?

10 MR. BRIDGES: Your Honor, we have not invoked those
11 rules. Alternatively, I think you're right that they would
12 control if we are wrong about the interlocutory nature of the
13 order.

14 THE COURT: Well, you have to be going under certain
15 -- some kind of authority when you file a motion. So I'm --

16 MR. BRIDGES: As an alternative --

17 THE COURT: I'm approaching this exactly, I assure
18 you, as the District Court or a Court of Appeals would. You
19 know, you start out, what is the legal authority that is being
20 invoked here?

21 MR. BRIDGES: Well, --

22 THE COURT: So I just assume Rule 60. I can't, you
23 know, come up with anything else that would be the authority.

24 MR. BRIDGES: Yes, Your Honor. You also have
25 inherent power to modify orders that are in violation of the

1 law. And we pointed you to --

2 THE COURT: Now, is that right? Is that really
3 right? Why do we have Rule 60 if I can just willy-nilly, oh,
4 I feel like I got that wrong two years ago? I can't do that,
5 can I? Rule 60 is the template for when a court can do that.
6 Parties are entitled to rely on orders of courts. And that's
7 why we have Rule 60, right? So, --

8 MR. BRIDGES: Your Honor, I think -- I think that
9 we're miscommunicating. I'm trying not to rely on Rule 60 in
10 the first instance because in the first instance we view this
11 as not a final order. So, in the first instance, --

12 THE COURT: I got that. And I've got my law clerks
13 looking up your cases to see if they convince me. But I'm
14 asking you to go to layer two. Assuming I don't agree with
15 you these are final orders, what is your authority for the
16 relief you're seeking?

17 MR. BRIDGES: Yes, Your Honor. Rule 60 would apply
18 in the alternative.

19 THE COURT: All right.

20 MR. BRIDGES: That's correct.

21 THE COURT: So, which provision? Which provision of
22 Rule 60? (b) what?

23 MR. BRIDGES: Your Honor, I'm not prepared to concede
24 any of them. I don't have the rule in front of me.

25 THE COURT: You're not prepared to concede what?

1 MR. BRIDGES: Any of the provisions of Rule 60. Just
2 (b) (1), (b) (2), especially, but I'm -- I'm -- Rule 60 is our
3 basis, as is the particulars (b) (1), (2), (6) --

4 (Garbled audio.)

5 THE COURT: Okay. You're breaking up. Can you
6 restate?

7 MR. BRIDGES: (b) (1), (2), and (6), as -- as well as
8 any other provision, Your Honor, of Rule 60.

9 THE COURT: Okay. Well, so (1), mistake,
10 inadvertence, surprise, excusable neglect. Which one of
11 those?

12 MR. BRIDGES: All of the above, Your Honor.

13 THE COURT: Surprise? Who's surprised?

14 MR. BRIDGES: Your Honor, I think every potential
15 litigant who discovers that your order purports to bar
16 prospective unaccrued claims at the time the order issued
17 would be surprised.

18 Frankly, I think Mr. Seery would be surprised, given his
19 testimony that he owes fiduciary duty -- duties that he must
20 abide by and that he appears to have, as I continue to
21 represent to clients, to advisees, and to the SEC, that those
22 duties are owing.

23 THE COURT: Okay. I'm giving you one more chance
24 here to make clear on the record what provision of Rule 60(b)
25 are you relying on, okay? I need to know. It's not in your

1 pleading.

2 MR. BRIDGES: Your Honor, --

3 THE COURT: So tell me specifically. I can only --

4 MR. BRIDGES: -- (b) (1) --

5 THE COURT: -- come up with a result here if I know
6 exactly what's being presented.

7 MR. BRIDGES: Your Honor, (b) (1), (b) (2), and (b) (6)

8 --

9 THE COURT: Which, okay, there are multiple parts to
10 (1). You're saying somebody's surprised by the ruling. I
11 don't know who. Really, all that matters is your client, the
12 Movants. You're saying, even though they participated, --

13 MR. BRIDGES: Yes, Your Honor.

14 THE COURT: -- got notice, they're somehow surprised?
15 Why are they surprised?

16 MR. BRIDGES: Yes, Your Honor.

17 THE COURT: Do you have evidence of their surprise?

18 MR. BRIDGES: Your Honor, our brief shows the
19 intentions of all involved were not the interpretation of that
20 order being advanced at this -- at this point in time. And
21 so, yes, I believe that is evidence. The transcripts of the
22 hearings I believe evidence that as well, that the
23 understanding of everyone involved was not that future --
24 unspecified future claims that had not accrued yet would be
25 released under (b) (1). Yes, Your Honor.

1 THE COURT: Okay.

2 MR. BRIDGES: Under (b) (2), --

3 THE COURT: I don't have any evidence of that. All I
4 have is the clear wording of the order. Okay. Let me just --
5 just let me go through this.

6 Assuming Rule 60 (1) through (6) are what you're arguing
7 here, what about Rule 60(c): a motion under Rule 60(b) must
8 be made within a reasonable time? We're now 11 months --

9 MR. BRIDGES: Your Honor, --

10 THE COURT: We're now 11 months past the July 2020
11 order. What is your authority for this being a reasonable
12 time?

13 MR. BRIDGES: Yes, Your Honor. If I may back up one
14 step before answering your question. Under (b) (2), we're
15 relying on newly-discovered evidence that was discovered in
16 late March and caused both the filing of this motion and the
17 filing of the District Court action.

18 Under (b) (4), we believe that the order is --

19 THE COURT: Let me stop. Let me stop. What is my
20 evidence that you're putting in the record that's newly
21 discovered?

22 MR. BRIDGES: The evidence is detailed in the
23 complaint that is in the record. You know, --

24 THE COURT: That's not evidence.

25 MR. BRIDGES: -- honestly, Your Honor, --

1 THE COURT: That is not evidence. Okay? A lawyer-
2 drafted complaint in another court is not evidence. Okay?

3 MR. BRIDGES: Your Honor, I think, to be technical,
4 that there is not a record yet, that we have evidence yet to
5 be admitted on our exhibit list. I believe in this
6 circumstance -- I understand that, in general, allegations in
7 a pleading are not evidence. In this instance, when we're
8 talking about whether or not new facts led to the filing of a
9 lawsuit, I do believe that the allegations in the lawsuit are
10 evidence of those new facts.

11 THE COURT: All right. Go on.

12 MR. BRIDGES: Under (b) (4), we believe the order is,
13 in part, void. It is void because of the jurisdictional and
14 other defects noted in our argument.

15 And also, under (b) (6) (garbled) ground for relief that
16 we're appealing to the equitable powers of this Court to
17 correct errors and manifest injustice towards not just the
18 litigants here but to correct the order of the Court to make
19 it comply with -- with the law, with the statutes promulgated
20 by Congress and to respect the jurisdiction of the District
21 Court.

22 THE COURT: All right. Do you agree with Mr.
23 Pomerantz that the case law standard for Rule 60(b) (4) is
24 exceptional circumstances? It's only applied so that a
25 judgment is voided in exceptional circumstances. Do you

1 disagree with that case authority?

2 MR. BRIDGES: I would -- I would agree, in part, that
3 unusual circumstances is not the ordinary case. I'm not
4 entirely sure what you mean by exceptional, but I think we're
5 on the same page.

6 THE COURT: Okay. It's not what I mean. That's just
7 the case law standard. And I'm asking, do you agree with Mr.
8 Pomerantz that that is the standard set forth in case law when
9 applying 60(b) (4)? There have to be some sort of exceptional
10 circumstances where there's just basically no chance the Court
11 had authority to do what it did.

12 MR. BRIDGES: Out of the ordinary would be the phrase
13 I would use, Your Honor.

14 THE COURT: Okay. So I guess then I'll go from
15 there. Is it your argument that gatekeeping provisions in the
16 bankruptcy world are out of the ordinary?

17 MR. BRIDGES: The exculpation of Mr. Seery for
18 liability falling short of gross negligence or intentional
19 wrongdoing in connection with his continuing to conduct the
20 business of the Debtor as an investment advisor subject to the
21 Advisers Act, yes, I would say that is out of the ordinary,
22 that it is extraordinary, that it is --

23 THE COURT: Okay. What is your authority or evidence
24 on that? Because this Court approves exculpation provisions
25 regularly in connection with employment orders, and pretty

1 much every judge I know does. In fact, I'm wondering why this
2 isn't just a term of compensation. You know, he's going to do
3 x, y, z in the case. His compensation is going to be a, b, c,
4 d, e. And by the way, we're going to set a standard of
5 liability for his performance as CEO or investment banker,
6 financial advisor, whatever, so that no one can sue him
7 regarding his performance of his job duties unless it rises to
8 the level of gross negligence, willful misconduct.

9 It's a term of employment that, from my vantage point,
10 seems to be employed all the time. So it would be anything
11 but exceptional circumstances. Do you have authority or
12 evidence --

13 MR. BRIDGES: Your Honor, frankly, --

14 THE COURT: -- to the contrary?

15 MR. BRIDGES: Your Honor, frankly, I'm astonished at
16 your view of that situation, that it would merely be a term of
17 his employment, that vitiates the entire fiduciary duty
18 standard created by the Advisers Act that tells him, with
19 hundreds of millions of dollars of assets under management for
20 people he's advising as a registered investment advisor,
21 people he's advising who believe that he has a fiduciary duty
22 to them and that it's enforceable, that the SEC, who monitors,
23 believes he has an enforceable fiduciary duty to those people,
24 and that he's testified that he has fiduciary duties to those
25 people, and that Your Honor is saying no, just as a regular

1 term of employment we have undone the Advisers Act's
2 imposition of an unwaivable fiduciary duty.

3 Your Honor, the order is void to the extent that it
4 attempts to do so.

5 This is not an ordinary employment agreement, Your Honor.
6 This is an attempt to exculpate someone from the key thing
7 that our entire investment system depends upon, regulation by
8 the SEC and the requirement in investment advisors to act as
9 fiduciaries when they manage the money of another.

10 It would be the equivalent of telling lawyers who are
11 appointed in a bankruptcy proceeding that they don't have any
12 duties to their client, or at least not fiduciary duties.
13 That the lawyers merely owe a duty not to be grossly negligent
14 to their clients. That's not an ordinary term of employment,
15 Your Honor.

16 THE COURT: All right. So I guess we're back to my
17 question, was this brought within a reasonable time under Rule
18 60(c)?

19 MR. BRIDGES: It was brought very quickly after the
20 new evidence was discovered at the end of March, Your Honor,
21 yes.

22 THE COURT: Okay. Well, I guess I'll just ask you
23 one more question before you continue on with your rebuttal
24 argument. I mean, again, I want your best argument of why
25 Villegas doesn't absolutely permit the gatekeeping provisions

1 that you're challenging. And many cases were cited by Mr.
2 Pomerantz in his brief where courts have extended the *Barton*
3 doctrine to persons other than trustees. And so what is your
4 best rebuttal to that?

5 MR. BRIDGES: Your Honor, we've already given it.
6 I'm afraid --

7 THE COURT: Okay. If you don't want to say more, --

8 MR. BRIDGES: -- what I have is not --

9 THE COURT: -- I'm not going to make you say more.

10 MR. BRIDGES: I --

11 THE COURT: I'm just telling you what's on my brain.

12 MR. BRIDGES: I do. I want to -- I am apologizing in
13 advance for repeating, but yes, *Villegas*, *Villegas*, however
14 that case is pronounced, says that *Stern* is not an exception
15 to the *Barton* doctrine.

16 THE COURT: Uh-huh.

17 MR. BRIDGES: 959(a) is an exception to the *Barton*
18 doctrine. You are not operating under the *Barton* doctrine
19 here. Even counsel's brief, the Debtor's brief, doesn't say
20 *Barton* applies. It says it's consistent with *Barton*.

21 Your Honor, in our previous hearing, you directed me to
22 the second sentence of 959(a) because you believe it's what
23 empowers you to do the gatekeeping. It limits the gatekeeping
24 that you can do by protecting jury rights, the right to trial,
25 says you cannot discharge, undo, deprive a litigant of their

1 right to a trial, a jury trial.

2 THE COURT: Well, you mentioned it again, jury trial
3 rights. Do you have any argument --

4 MR. BRIDGES: Yes, Your Honor.

5 THE COURT: -- of why that hasn't flown out the
6 window?

7 MR. BRIDGES: Yes, Your Honor. I am told that
8 Section 14(f) that counsel for the Debtor referred to is not a
9 waiver of jury rights at all. It is an arbitration agreement.
10 Your Honor is probably familiar how arbitration agreements
11 work, is that they need not be elected. They need not be
12 invoked by the parties. When they are, they create a
13 situation where arbitration may be required. But a waiver of
14 a jury right outside of arbitration is not part of this
15 arbitration clause, or of any. The issue is not briefed or in
16 evidence before the Court. We're relying on representations
17 of counsel as to what that provision contains. That Mr. Seery
18 wasn't even a party to that agreement, the advisory agreement,
19 with the Charitable DAF. The arbitration agreement is subject
20 to defenses that are not at issue here before the Court. That
21 Movants' rights, their contractual rights to invoke the
22 arbitration clause, also appear to be terminated by the
23 orders' assertion of sole jurisdiction in this matter.

24 Your Honor, yes, our jury rights survive Section 14(f) in
25 the advisory agreement with the DAF for all of those potential

1 reasons.

2 On top of that, it doesn't go to all of our causes of
3 action. It goes to the contract cause of action. And to the
4 extent they can argue that the other claims are subject to
5 arbitration, that also is a defense and -- defensible and
6 complex issue requiring the application of the Federal
7 Arbitration Act, requiring consideration of the Federal
8 Arbitration Act, which this Court doesn't have jurisdiction to
9 do under 157(d).

10 THE COURT: What? Repeat that.

11 MR. BRIDGES: Yes. This Court does not have
12 jurisdiction to determine whether or not arbitration --
13 arbitration is enforceable due to the mandatory withdrawal of
14 the reference provisions of 157(d).

15 THE COURT: That's just not consistent with Fifth
16 Circuit authority. *National Gypsum*. What are some of these
17 other arbitration cases? I've written an article on it. I
18 can't remember them. That's just not right. Bankruptcy
19 courts look at arbitration clauses all the time. Motions to
20 compel arbitration.

21 MR. BRIDGES: Your Honor, under 157(d), in the
22 circumstances of this case, if the Court is going to take into
23 consideration an arbitration clause under the Federal
24 Arbitration Act, when that clause is not in evidence and is
25 not before the Court, then Movants respectfully move to

1 withdraw the reference of your consideration of that issue and
2 of any proceeding and ask that you would issue only a report
3 and recommendation rather than an order on that issue.

4 THE COURT: Okay. I regret that we even got off on
5 this trail. I'm sorry. So just proceed with your rebuttal
6 argument as you had envisioned it, Mr. Bridges.

7 MR. BRIDGES: Thank you, Your Honor.

8 Debtor's counsel says there's no private right of action
9 under the Advisers Act. That is both inaccurate and
10 misleading. The Advisory Act creates, imposes fiduciary
11 duties that state law provides the cause of action for. It is
12 a state law breach of fiduciary duty claim regarding --
13 regarding fiduciary duties imposed as a matter of law by the
14 Investment Advisers Act that is Count One in the District
15 Court action.

16 Furthermore, that Act does create a private right of
17 action for rescission. That would be rescission of the
18 advisory agreement with the Charitable DAF, not rescission of
19 the HarbourVest settlement.

20 Second, Your Honor, the notion that this Court has related
21 to jurisdiction is irrelevant and beside the point. I would
22 like to note for the record that the District Court civil
23 cover sheet that omitted to state that this was a related
24 action has been corrected, has been amended, and that that has
25 taken place.

1 Counsel for the Debtor also appears to agree with us that
2 the order ought to be modified for having asserted exclusive
3 jurisdiction over colorable claims to the extent it's not
4 legally permissible to do. And in trying to invoke the
5 discussions between us as to how the orders might be fixed,
6 what counsel does is tries to cabin the legally-permissible
7 caveat to just the second half of the paragraph at issue. It
8 is both -- both portions, the gatekeeping and the subsequent
9 hearing of the claims, that should be limited to the extent it
10 would be impermissible legally for this Court to make those
11 decisions.

12 On top of that, Your Honor, merely stating "to the extent
13 legally permissible" would result in a considerable amount of
14 ambiguity in the order that would lead it, I fear, to be
15 unenforceable as a matter of law.

16 Next, Your Honor, when Debtor's counsel talks about the
17 authority in this case, it feels like we're ships passing in
18 the night. He says that we're wrong in asserting that no case
19 we can find involves both the *Barton* doctrine and the
20 application of the business judgment rule where the Court is
21 asked to defer, and he mentions cases that apply the *Barton*
22 doctrine to an approval rather than an appointment. The Court
23 is asked to --

24 (Garbled audio.)

25 THE COURT: I lost you for a moment. Could you

1 repeat the last 30 seconds?

2 MR. BRIDGES: Thank you, Your Honor. Yes. He points
3 -- opposing counsel points us to case law where the *Barton*
4 doctrine has been applied despite the Bankruptcy Court having
5 merely approved rather than appointed the trustee or the, I'm
6 sorry, the professional. But in doing so, he doesn't
7 reference any case that has done so in the context of business
8 judgment rule deference. It's like we're ships passing in the
9 night.

10 What we're saying isn't that a mere approval can never
11 rise to the level of the *Barton* doctrine. What we're saying
12 is that, in combination with the business judgment rule
13 deference, the two cannot go together. There's no authority
14 for saying that they do.

15 We -- I further feel like we're ships passing in the night
16 when he talks about *Shoaf*. Counsel says that in *Shoaf* there
17 was a confirmed final plan and it specifically identified the
18 released guaranty. And yeah, that distinguishes it from this
19 case, just as it distinguished -- just as the *Applewood Chair*
20 case distinguished it when there's not that specific
21 identification. And here, we don't even have a final plan
22 confirmation at the time these orders are being issued.
23 Without that express -- express notion of what the claims are
24 being discharged, *Shoaf* doesn't apply.

25 There, there was a guaranty to a party on a specific

1 indebtedness that was listed, identified with specificity, and
2 disappeared as a result of the judgment, as a result of the
3 judgment in the underlying case. Here, we're talking about
4 any potential claim that might arise in the future. As of the
5 July order's issuance, it didn't apply on its -- either it
6 didn't apply to future claims that had not yet accrued or else
7 in violation of *Applewood Chair*, it was releasing claims
8 without identifying them.

9 Who does Seery owe a fiduciary duty to? Is it, as
10 Debtor's counsel says, only to the funds and not to the
11 investors, or does he also owe those duties to the investors
12 as well? Your Honor, that is going to be a hotly-contested
13 issue in this litigation, and it involves -- it requires
14 consideration of the Advisers Act and the multitude of
15 accompanying regulations. To just state that his fiduciary
16 duties are limited in a way that couldn't affect anyone that
17 is -- whose claims are precluded by the July order is both
18 wrong on the law and is invoking something that will be a
19 hotly-contested issue that falls under 157(d), where, again,
20 this Court doesn't have the jurisdiction to decide that, other
21 than in a report and recommendation.

22 The order is legally infirm because it's issued without
23 jurisdiction for doing that as well.

24 Finally, Your Honor, I think (garbled) wrong direction
25 with a statement that suggests that Mr. Seery is an agent of

1 the independent directors under the January order. He is, in
2 fact, not an independent agent -- not an agent of any of the
3 independent directors, but, at most, of the company that is
4 controlled by the board, not -- not of individual directors
5 who could confer on him -- who could confer on him any
6 immunity that they have obtained from the January order just
7 by having appointed him.

8 The proposed order from the other side failed to address
9 either the ambiguity in the order or its attempt to exculpate
10 Mr. Seery from the liability, including liability for which
11 there is a jury trial right, and it is not a fix to the
12 problem for that reason.

13 In order to make the order enforceable and to fix its
14 infirmities, the Court would have to do significantly more.
15 It would have to both apply the caveat from the final
16 confirmation plan order, rope that caveat to the first part of
17 the relevant paragraph, as well as the second part, and it
18 would have to provide directive clarity to be enforceable
19 rather than too vague.

20 Your Honor, I think that's all I have.

21 THE COURT: Okay. Just FYI, my law clerk pulled the
22 *Smyth* case from 21 years ago from the Fifth Circuit. And
23 while it more prominently deals with the issue of whether
24 trustees -- in this case, it was a Chapter 11 trustee -- could
25 be subjected to personal liability for damages to the

1 bankruptcy estate --

2 (Echoing.)

3 THE COURT: Someone, put your phone on mute. I don't
4 know who that is.

5 It dealt with, you know, the standard of liability, that
6 the trustee could not be sued for matters not to the level of
7 gross negligence.

8 But it does say, in the very last paragraph, to my shock
9 and amazement, that -- it's just one sentence in a 10-page
10 opinion -- orders appointing counsel -- and it was talking
11 about the trustee's lawyer he hired to handle appeals to the
12 Fifth Circuit -- orders appointing counsel under the
13 Bankruptcy Code are interlocutory and are not generally
14 considered final and appealable. And it cites one case from
15 1993, the Middle District of Florida. Live and learn. There
16 is one sentence in that opinion that says that. But I don't
17 know that it's hugely impactful here, but I did not know about
18 that opinion and I'm rather surprised.

19 All right. You were going to walk me through evidence,
20 you said?

21 MR. BRIDGES: Well, do I -- Your Honor, do you want
22 to do that first before I submit --

23 THE COURT: Yes, please.

24 MR. BRIDGES: -- my rebuttal argument?

25 THE COURT: Please.

1 MR. BRIDGES: Okay.

2 THE COURT: Uh-huh.

3 MR. BRIDGES: Your Honor, we would submit and offer
4 Exhibits 1 through 44, with the exception of those that have
5 been withdrawn, that are 2, 13 --

6 THE COURT: Okay. Slow down. Slow down. I need to
7 get to the docket entry number we're talking about. Are we
8 talking -- are your -- the Debtor's exhibits are at 2412. But
9 Nate, I misplaced my notes. Where are Charitable DAF and
10 Holdco's?

11 THE CLERK: I have 2411.

12 THE COURT: 2411? Is that it?

13 MR. BRIDGES: 2420, Your Honor.

14 THE COURT: 2420? Okay. Give me a minute. (Pause.)
15 2420?

16 MR. BRIDGES: Yes, Your Honor.

17 THE COURT: Okay, I'm there. And it's which
18 exhibits?

19 MR. BRIDGES: It's Exhibits 1 through 44, Your
20 Honor, with four exceptions. We have agreed to withdraw
21 Exhibit 2, 13, 14, and 29.

22 THE COURT: All right.

23 MR. BRIDGES: Also, Your Honor, we'd like to submit
24 Debtor's Exhibit 1, which is under Exhibit 49 on our list,
25 would be anything offered by the other side. But we'd like

1 to make sure that Debtor's Exhibit 1 gets in the record as
2 well.

3 THE COURT: Let me back up. When I pull up the
4 docket entry you just told me, I have Exhibits 44, 45, and 46
5 only. Am I misreading this?

6 MR. BRIDGES: I have a chart showing Exhibits 1
7 through 49 titled Docket 2420 filed 6/7/21.

8 THE COURT: Okay. The docket entry number you told
9 me, 2420, it only has three exhibits: 44, 45, and 46. So,
10 first off, I understand -- are you offering 45 and 46 or not?

11 MR. BRIDGES: No, Your Honor.

12 THE COURT: Okay. So you said you were offering 1
13 through 44 minus certain ones. 44 is here.

14 MR. BRIDGES: Yes.

15 THE COURT: But I've got to go back to a different
16 docket number.

17 THE CLERK: It's actually 2411.

18 THE COURT: It's at 2411. That has all the others?

19 THE CLERK: Yes.

20 THE COURT: Okay.

21 So, Mr. Pomerantz, do you have any objection to Exhibits
22 1 through 44, which he's excepted out 2, 13, 14, and 29, and
23 then he's added Debtor's Exhibit 1? Any objection?

24 MR. POMERANTZ: I don't believe so. I just would
25 confirm with John Morris, who has been focused on the

1 exhibits, just to confirm.

2 THE COURT: Mr. Morris?

3 MR. MORRIS: No objection, Your Honor. It's fine.

4 THE COURT: Okay. They're admitted.

5 (Movants' Exhibits 1, 3 through 12, 15 through 28, and 30
6 through 44 are received into evidence. Debtor's Exhibit 1 is
7 received into evidence.)

8 THE COURT: So, any --

9 MR. BRIDGES: Thank you, Your Honor.

10 THE COURT: Anything you wanted to call to my
11 attention about these?

12 MR. BRIDGES: Your Honor, the things that we
13 mentioned in the argument, for sure, but especially that the
14 word "trustee" is not used in the January hearing's
15 transcript, nor is it under discussion in that transcript
16 that it would be a trustee-like role being played by the
17 Strand directors, as well as the transcript of the July
18 hearing on the order at issue here, Your Honor, where you are
19 asked to defer both in that transcript and in the motion, the
20 motion that was at issue in that hearing, you are asked to
21 defer to the business judgment of the company.

22 And finally, Your Honor, I'd ask you to look at the
23 allegations in the District Court complaint.

24 THE COURT: All right.

25 Mr. Pomerantz or Morris, let's see what exhibits you're

1 wanting the Court to consider. Your exhibits, it looks like,
2 are at Docket Entry 2412.

3 MR. MORRIS: As subsequently amended at 2423.

4 THE COURT: Oh. All right. So which ones are you
5 offering?

6 MR. MORRIS: We're offering all of the exhibits on
7 2423, which is 1 through 17.

8 (Echoing.)

9 THE COURT: Whoops. We got some distortion there.
10 Say again?

11 MR. MORRIS: Yeah. All of the exhibits that are on
12 2423, which are Exhibits 1 through 17. But I want to make
13 sure that, as I did earlier, that that has the exhibits that
14 we're relying on. Does that --

15 (Pause.)

16 THE COURT: Okay. Let me make sure I know what's
17 going on here. You're double-checking your exhibits, Mr.
18 Morris?

19 MR. MORRIS: Yes, Your Honor.

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: Your Honor, we start with Docket No.
23 2419, --

24 THE COURT: Okay.

25 MR. MORRIS: -- which was the amended exhibit list.

1 And that actually had Exhibits 1 through 17. And then that
2 was amended at Docket 2423. So, the exhibits on both of
3 those lists.

4 THE COURT: Well, they're one and the same, it looks
5 like, right?

6 MR. MORRIS: Yes.

7 THE COURT: Okay. So you're offering those?

8 MR. MORRIS: I think -- yeah.

9 THE COURT: Any objection?

10 MR. BRIDGES: No objection.

11 THE COURT: All right. They're admitted.

12 (Debtor's Exhibits 1 through 17 are received into
13 evidence.)

14 MR. POMERANTZ: Your Honor, if I may take a few
15 moments to respond to Mr. Bridges' reply?

16 THE COURT: All right. Is he still within his hour
17 and a half?

18 THE CLERK: At an hour and one minute.

19 THE COURT: Okay. All right. You have a little
20 time left, so go ahead.

21 MR. POMERANTZ: Thank you, Your Honor.

22 So look, I -- it sort of was really not fair to us. Mr.
23 Bridges was really making things up on the fly. He was
24 changing the theories of his case and responding to Your
25 Honor. But I'm going to do my best to respond to the

1 arguments made, many of which I sort of anticipated.

2 I'll first start with the issue that Your Honor raised,
3 which was whether this is under Rule 60 or not. Mr. Bridges
4 identified a couple of cases, said that the order was
5 interlocutory, said that somehow the orders have anything to
6 do with a plan confirmation order. They do not. Your Honor
7 didn't hear that argument at the plan confirmation. The
8 January 9th and July 16th orders are old and cold. There's
9 an exculpation provision in the plan. There's a gatekeeper
10 in the plan. The provisions do not overlap entirely. The
11 gatekeeper applies prospectively. The exculpation provision
12 includes additional parties.

13 So the arguments that basically the plan had anything to
14 do -- and the fact that the plan is not a final order -- has
15 anything to do with the January 9th and July 16th orders is
16 just wrong. It's just wrong.

17 More fundamentally, Your Honor, as Your Honor pointed
18 out, the *Smyth* case is a professional employment order. And
19 ironically, if you abide by the *Smyth* case, that order is
20 never appealable because it's interlocutory.

21 But more fundamentally, Your Honor, that's dealing with
22 327 professionals. And again, there's not much analysis in
23 the *Smyth* case, but we're not dealing with a 327
24 professional. We're dealing with orders that were approved
25 under 363.

1 So the premise of the argument that Rule 60(b) -- 60
2 doesn't apply and they have other arguments just doesn't make
3 any sense.

4 Okay. So now that gets us to Rule 60. And Your Honor,
5 Your Honor hit the nail on the head. They haven't presented
6 any evidence. Allegations in a complaint aren't evidence.
7 They can't stand up there and say surprise evidence. They
8 had the opportunity -- and this hearing's been continued a
9 few weeks -- they had the opportunity to bring it up, and
10 it's -- they had the opportunity to claim that there was
11 surprise, but they just didn't. Okay?

12 So to go on to the Rule 60 arguments. Surprise.
13 Surprise and reasonable delay are really -- go hand in hand
14 with Mr. Bridges' argument. He says, well, we didn't find
15 out that -- months after the order was entered that he
16 violated a duty to us, so we are surprised by that, and it's
17 a reasonable time. Well, Your Honor, the order provided for
18 an exculpation. CLO Holdco and DAF knew that it applied to
19 an exculpation. They were bound. They knew based upon that
20 order that they would not be able to bring claims for normal
21 negligence. There is no surprise.

22 If you take Mr. Bridges' argument to its conclusion, he
23 could wait until the end of the statute of limitations after
24 an order and have come in four years from now and say, Your
25 Honor, we just found out facts so we should go back four

1 years before. That, Your Honor, that's not how the surprise
2 works. That's not how the reasonable time works.

3 Mr. Bridges did not contest that they're bound by res
4 judicata. He did not contest that the exculpation itself was
5 clear and unambiguous. Of course he argued Your Honor
6 couldn't enter an order saying there was exculpation, again,
7 with no authority. And he seemed surprised, as I suspect he
8 should, since he's not a bankruptcy lawyer, that retention
9 orders, whether it's investment bankers, financial advisors,
10 include exculpations all the time. So there's no grounds
11 under surprise.

12 There's no grounds -- the motions are late under 60(c).

13 And they're not void. I went through a painstaking
14 analysis, Your Honor, and I described in detail what the
15 *Espinosa* case held, and the exceptional circumstances which
16 Mr. Bridges tried to get away from as much as he could.
17 Maybe he can try to get away from language in a district
18 Court opinion, in a Bankruptcy Court opinion, in a Circuit
19 Court opinion. You can't get away from language in a Supreme
20 Court opinion. The Supreme Court opinion said exceptional
21 circumstances, where there was arguably no basis for
22 jurisdiction for what the Court did. They have not even come
23 close to convincing Your Honor that there was absolutely no
24 basis.

25 Now, they disagree. We granted, we think it's a good-

1 faith disagreement, but they haven't come close to
2 establishing the *Espinosa* standard, so their motion under 60
3 does not -- it fails.

4 And I don't think -- look, these are good lawyers. Mr.
5 Bridges and Mr. Sbaiti are good lawyers. They didn't just
6 inadvertently not mention Rule 60. They never mentioned it
7 because they knew they had no claim under Rule 60.

8 Your Honor, Mr. Bridges has made comments about the
9 fiduciary duty of Mr. Seery, about what the Investor's Act
10 provides. He's just wrong on the law. Now, Your Honor
11 doesn't have to decide that. Whichever court adjudicates the
12 DAF lawsuit will have to decide it. But there is no private
13 cause of action for damages. There are no fiduciary duties to
14 the investors.

15 And what Mr. Bridges doesn't even mention, in that the
16 investment agreement that's so prominent in his complaint,
17 they waived claims other than willful misconduct and gross
18 negligence against Highland. They waived those claims. So
19 for Mr. Bridges to come in here and argue that there's some
20 surprise, when he hasn't even bothered to look at the document
21 that's underlying the contractual relationship between the DAF
22 and the Debtor, is -- you know, I'll just say it's
23 inadvertence.

24 Your Honor, Mr. Bridges tried to argue that Mr. Seery is
25 not a beneficiary of the January 9th order. He's not an

1 agent. Well, again, Your Honor, Mr. Bridges wasn't there.
2 Your Honor and we were. On January 9th, an independent board
3 was picked, and at the time Mr. Dondero ceased to become the
4 CEO. So you have three gentlemen coming in -- Mr. Seery, Mr.
5 Dubel, and Mr. Nelms -- coming in to run Highland, in a very
6 chaotic time. They had to act through their agents. There
7 was no expectation that this board was going to actually run
8 the day-to-day operations of the Debtor. Of course not. They
9 needed someone to run. And they picked Mr. Seery. And the
10 argument that well, he's an agent of the company, he's not an
11 agent of the board, that just doesn't make sense. The
12 independent board had to act. The directors had to act. And
13 the directors, how do they deal with that? They acted through
14 Mr. Seery. So he is most certainly governed by the January
15 9th order.

16 Your Honor, I want to talk about the jury trial right.
17 Mr. Bridges said that Paragraph 14 is an arbitration clause
18 and not a jury trial waiver. Now, again, I will forgive Mr.
19 Bridges because I assume he didn't read the provision, okay,
20 and he -- somebody told him that, and that person just got it
21 wrong. But what I would like to do is read for Your Honor
22 Paragraph 14(f). It doesn't have to do with arbitration.
23 It's a waiver of jury trial. 14(f), Jurisdiction Venue,
24 Waiver of Jury Trial. The parties hereby agree that any
25 action, claim, litigation, or proceeding of any kind

1 whatsoever against any other party in any way arising from or
2 relating to this agreement and all contemplated transactions,
3 including claims sounding in contract, equity, tort, fraud,
4 statute defined as a dispute shall be submitted exclusively to
5 the U.S. District Court for the Northern District of Texas, or
6 if such court does not have subject matter jurisdiction, the
7 courts of the State of Texas, City of Dallas County, and any
8 appellate court thereof, defined as the enforcement court.

9 Each party ethically and unconditionally submits to the
10 exclusive personal and subject matter jurisdiction of the
11 enforcement court for any dispute and agrees to bring any
12 dispute only in the enforcement court. Each party further
13 agrees it shall not commence any dispute in any forum,
14 including administrative, arbitration, or litigation, other
15 than the enforcement court. Each party agrees that a final
16 judgment in any such action, litigation, or proceeding is
17 conclusive and may be enforced through other jurisdictions by
18 suit on the judgment or in any manner provided by law.

19 And then the kick, Your Honor, all caps, as jury trial
20 waiver always are: Each party irrevocably and unconditionally
21 waives to the fullest extent permitted by law any right it may
22 have to a trial by jury in any legal action, proceeding, cause
23 of action, or counterclaim arising out of or relating to this
24 agreement, including any exhibits, schedules, and appendices
25 attached to this agreement or the transactions contemplated

1 hereby. Each party certifies and acknowledges that no
2 representative of the owner of the other party has represented
3 expressly or otherwise that the other party won't seek to
4 enforce the foregoing waiver in the event of a legal action.
5 It has considered the implications of this waiver, it makes
6 this waiver knowingly and voluntarily, and it has been induced
7 to enter into this agreement by, among other things, the
8 mutual waivers and certifications in this section.

9 Your Honor, I will forgive Mr. Bridges. I assume he just
10 did not read that. But to represent to the Court that that
11 language does not contain a jury trial waiver is -- is just
12 wrong.

13 THE COURT: All right. I'm going to stop right
14 there. And you were reading from the Second Amended and
15 Restated Shared Services Agreement between Highland --

16 MR. POMERANTZ: Not shared services. I'm reading
17 from the Second Amended and Restated Investment Advisory
18 Agreement --

19 THE COURT: Investment --

20 MR. POMERANTZ: -- between the Charitable DAF, the
21 Charitable DAF GP, and Highland Capital Management. The
22 agreement whereby the Debtor was the investment advisor to the
23 Charitable DAF Fund and the Charitable DAF GP.

24 THE COURT: All right. Well, Mr. Bridges, I'm going
25 to bounce quickly back to you. This is your chance to defend

1 your honor.

2 MR. BRIDGES: Yeah, we're -- we're looking at a
3 different agreement, where -- where literally the words that
4 were read to you are not in the agreement in front of us and
5 it is news to me. So, Your Honor, this is a problem --

6 THE COURT: What is the agreement you're looking at?

7 MR. BRIDGES: It is the Amended -- I assume that
8 means First Amended -- Restated Advisory Agreement.

9 MR. POMERANTZ: Your Honor, we are happy to file this
10 agreement with the Court so the Court has the benefit of it in
11 connection with Your Honor's ruling.

12 THE COURT: Okay. I would like you to do that. Uh-
13 huh.

14 MR. BRIDGES: I'd like -- I'd like to request -- I'll
15 withdraw that.

16 THE COURT: Okay. Go on, Mr. Pomerantz.

17 MR. POMERANTZ: Mr. Bridges, if you could put us on
18 mute. If you could put us on mute, Mr. Bridges, so I don't
19 hear your feedback. Thank you.

20 Mr. Bridges also complains about the language "to the
21 extent permissible by law." As Your Honor knows and as has
22 been my practice over 30 years, that language is probably in
23 every plan where there's a retention of jurisdiction: to the
24 extent permissible by law. And Mr. Bridges says that this
25 will create ambiguity in the order that couldn't be enforced.

1 There's no basis for that. Our including the language "to the
2 extent permissible by law" in the orders, as we are prepared
3 to do, is consistent with the plan confirmation order where we
4 addressed that issue. And we addressed that issue because we
5 didn't want to put Your Honor in a position where thereby Your
6 Honor may have an action before Your Honor that passes the
7 colorability gate that Your Honor may not be able to assert
8 jurisdiction. And since jurisdiction can't be waived in that
9 regard, we will agree to amend that.

10 There's nothing ambiguous about that, and there's no
11 reason, though, that clause has to modify the Court's ability
12 to act as a gatekeeper, because, as we've argued *ad nauseam*,
13 gatekeeper provisions where the Court has that ability is not
14 only part of general bankruptcy jurisprudence but also part of
15 the Bankruptcy Code.

16 Counsel says that *Barton* doesn't apply because the
17 business judgment of Your Honor was used in retaining Mr.
18 Seery as opposed to in some other capacity. There's no basis
19 for that, Your Honor. A court-appointed -- a court-approved
20 CEO, CRO, professional, they are all entitled to protection
21 under the *Barton* act. And the argument -- and again, this is
22 separate and apart from whether he's entitled to protection
23 under the January 9th order. But the argument that because it
24 was the business judgment -- again, business judgment in doing
25 something that Your Honor expressly contemplated under the

1 January 9th corporate governance order -- there's just no law
2 to support that. And I guess he's trying to get around the
3 plethora of cases that deal with the situation where *Barton*
4 has been extended.

5 Your Honor, Mr. Bridges, again, in arguing that we're
6 ships passing in the night on *Shoaf* and *Applewood* and
7 *Espinosa*, no, we're not ships passing in the night. We have a
8 difference in agreement on what these cases stand for. These
9 cases stand for the proposition that a clear and unambiguous
10 provision, plain and simple, if it's clear and unambiguous, it
11 will be given res judicata effect. The release in *Shoaf*,
12 clear and unambiguous. The release in *Applewood*, not. The
13 issue here is the exculpation language. That was clear and
14 unambiguous. It applied prospectively. The argument makes no
15 sense that we didn't identify -- we didn't identify claims
16 that might arise in the future, so therefore an exculpation
17 clause doesn't apply? That doesn't make any sense.

18 Your Honor clearly exculpated parties. Mr. Dondero knew
19 it. CLO Holdco knew it. The DAF knew it. So the issue Your
20 Honor has to decide is whether that exculpation was a clear
21 and unambiguous provision such that it should be entitled to
22 res judicata effect. And we submit that the answer is
23 unequivocally yes.

24 That's all I have, Your Honor.

25 THE COURT: All right. Well, --

1 MR. MORRIS: Your Honor? I apologize.

2 THE COURT: Okay.

3 MR. MORRIS: This is John Morris.

4 THE COURT: Yes?

5 MR. MORRIS: I just want to, with respect to the
6 exhibits, I know there was no objection, but I had cited to
7 Docket Nos. 2419 and 2423. The original exhibit list is at
8 Docket No. 2412. So it's the three of those lists together.
9 2412, as amended by 2419, as amended by 2423. Thank you very
10 much.

11 THE COURT: All right. Thank you. All right.

12 MR. BRIDGES: Your Honor, I still have no objection
13 to that, but may I have the last word on my motion?

14 THE COURT: Is there time left?

15 THE CLERK: Yes.

16 THE COURT: Okay. Go ahead.

17 MR. BRIDGES: I just need a minute, Your Honor. They
18 agreed to change the order. They proposed it to us. They
19 proposed it in a proposed order to you. They can't also say
20 that it cannot be changed.

21 Secondly, Your Honor, in *Milic v. McCarthy*, 469 F.Supp.3d
22 580, the Eastern District of Virginia points out that the
23 Fourth Circuit treats appointment of estate professionals as
24 interlocutory orders as well.

25 That's all. Thank you, Your Honor.

1 THE COURT: All right. Here's what we're going to
2 do. We've been going a very long time. I'm going to take a
3 break to look through these exhibits, see if there's anything
4 in there that I haven't looked at before and that might affect
5 the decision here. So we will come back at 3:00 o'clock
6 Central Time -- it's 2:22 right now -- and I will give you my
7 bench ruling on this. All right.

8 So, Mike, they can all stay on the line, right?

9 Okay. You can stay on, and we'll be back at 3:00 o'clock.

10 THE CLERK: All rise.

11 (A recess ensued from 2:22 p.m. to 3:04 p.m.)

12 THE CLERK: All rise.

13 THE COURT: All right. Please be seated. All right.
14 Everyone presented and accounted for. We're going back on the
15 record.

16 MR. POMERANTZ: Your Honor, before you start, this is
17 Jeff Pomerantz. We had sent to your clerk, and hopefully it
18 got to you, a copy of the Second Amended and Restated
19 Investment Advisory Agreement. We also copied Mr. Sbaiti with
20 it as well. And we would also like to move that into
21 evidence, just so that it's part of the Court's record.

22 THE COURT: All right.

23 MR. BRIDGES: We would object to that, Your Honor.
24 We haven't had an opportunity to even verify its authenticity
25 yet.

1 THE COURT: All right. Well, I'll tell you what.
2 I'm going to address this in my ruling. So it's not going to
3 be part of the record for this decision, and yet -- well, I'll
4 get to it.

5 All right. So we're back on the record in Case Number 19-
6 34054, Highland Capital. The Court has deliberated, after
7 hearing a lot of argument and allowing in a lot of documentary
8 evidence, and the Court concludes that the motion of CLO
9 Holdco, Ltd. and The Charitable DAF to modify the retention
10 order of James Seery, which was entered almost a year ago, on
11 July 16th, 2020, should be denied.

12 This is the Court's oral bench ruling, but the Court
13 reserves discretion to supplement or amend in a more fulsome
14 written order what I'm going to announce right now, pursuant
15 to Rule 7052.

16 First, what is the Movants' authority to request the
17 modification of a bankruptcy court order that has been in
18 place for so many months, which was issued after reasonable
19 notice to the Movants, and after a hearing, which was not
20 objected to by the Movants, or appealed, when the Movants were
21 represented by sophisticated counsel, I might add, and which
22 order was relied upon by parties in this case, most notably
23 Mr. Seery and the Debtor, and in fact was entered after
24 significant negotiations involving a sophisticated court-
25 appointed Unsecured Creditors' Committee with sophisticated

1 professionals and sophisticated members, and after negotiation
2 with an independent board of directors, court-appointed, one
3 of whose members is a retired bankruptcy judge? What is the
4 Movants' authority?

5 Movants fumbled a little on that question, in that the
6 exact authority wasn't set forth in the motion. But Movants'
7 primary argument is that Movants think the Seery retention
8 order was an interlocutory order and that the Court simply has
9 the inherent authority to modify it as an interlocutory order.

10 The Court disagrees with this analysis. I do not think
11 the Fifth Circuit's *Smyth* case dictates that the Seery
12 retention order is still interlocutory. The Seery retention
13 order was an order entered pursuant to Section 363 of the
14 Bankruptcy Code, not a Section 327 professionals to a debtor-
15 in-possession, professionals to a trustee employment order
16 such as the one involved in the *Smyth* case.

17 But even if the Seery retention order is interlocutory --
18 the Court feels strongly that it's not, but even if it is --
19 the Court believes it would be an abuse of this Court's
20 inherent discretion or authority to modify that order almost a
21 year after the fact and under the circumstances of this case.

22 Now, assuming Rule 60(b) applies to the Movants' request,
23 the Court determines that the Movants have not made their
24 motion anywhere close to within a reasonable time, as Rule
25 60(c) requires, nor do I think the Movants have demonstrated

1 any exceptional circumstances to declare the order or any of
2 its provisions void. The Movants have put on no evidence that
3 constitutes surprise or constitutes newly-disputed evidence.
4 So why are there no exceptional circumstances here such that
5 the Court might find, you know, a void order or void
6 provisions of an order?

7 First, this Court concludes that there's no credible
8 argument that the Court overreached its jurisdiction with the
9 gatekeeping provisions in the order. Gatekeeping provisions
10 are not only very common in the bankruptcy world -- in
11 retention orders and in plan confirmation orders, for example
12 -- but they are wholly consistent with the *Barton* case, the
13 U.S. Supreme Court's *Barton's* case, and its progeny that has
14 become known collectively as the *Barton* doctrine. Gatekeeping
15 provisions are wholly consistent with 28 U.S.C. Section
16 959(a)'s complete language.

17 The Fifth Circuit has blessed gatekeeping provisions in
18 all sorts of contexts. It has blessed them in the situation
19 of when *Stern* claims are involved in the *Villegas* case. It
20 even blessed Bankruptcy Courts' gatekeeping functions a long
21 time ago, in 1988, in a case that I don't think anyone
22 mentioned in the briefing, but as I've said, my brain
23 sometimes goes down trails, and I'm thinking of the *Louisiana*
24 *World Exposition* case in 1988, when the Fifth Circuit blessed
25 there a procedure where an unsecured creditors' committee can

1 bring causes of action against persons, such as officers and
2 directors or other third parties, if they first come to the
3 Bankruptcy Court and show a colorable claim. They have to
4 come to the Bankruptcy Court, show they have a colorable claim
5 and they're the ones that should be able to pursue them. Not
6 exactly on point, but it's just one of many cases that one
7 could cite that certainly approve gatekeeper functions of
8 various sorts of Bankruptcy Courts.

9 It doesn't matter which court might ultimately adjudicate
10 the claims; the Bankruptcy Court can be the gatekeeper.

11 And the Court agrees with the many cases cited from
12 outside this circuit, such as the case in Alabama, in the
13 Eleventh Circuit, and there was another circuit-level case, at
14 least one other, that have held that the *Barton* doctrine
15 should be extended to other types of case fiduciaries, such as
16 debtor-in-possession management, among others.

17 Finally, as I pointed out in my confirmation ruling in
18 this case, gatekeeping provisions are commonplace for all
19 types of courts, not just Bankruptcy Courts, when vexatious
20 litigants are involved. I have commented before that we seem
21 to have vexatious litigation behavior with regard to Mr.
22 Dondero and his many controlled entities.

23 Now, as far as the Movants' argument that there was not
24 just improper gatekeeping provisions but actually an improper
25 discharge in the Seery retention order of negligence claims or

1 other claims that don't rise to the level of gross negligence
2 or willful misconduct, again, I reiterate there's nothing
3 exceptional in the bankruptcy world about exculpation
4 provisions like this. They absolutely are a term of
5 employment very often. Just like compensation, they're
6 frequently requested, negotiated, and approved. They are
7 normal in the corporate governance world, generally. They are
8 normal in corporate contracts between sophisticated parties.
9 And most importantly of all, even if this Court overreached
10 with the exculpation provisions in the Seery retention order,
11 even if it did, res judicata bars the attack of these
12 provisions at this late stage, under cases such as *Shoaf*,
13 *Republic Supply v. Shoaf* from the Fifth Circuit, the *Espinosa*
14 case from the U.S. Supreme Court, and even *Applewood*, since
15 the Court finds the language in this order was clear,
16 specific, and unambiguous with regard to the gatekeeping
17 provisions and the exculpation provisions.

18 Last, and this is the part where I said I'm going to get
19 to this agreement that has been submitted, the Second Amended
20 and Restated Investment Advisor Agreement or whatever the
21 title is. I am more than a little disturbed that so much of
22 the theme of the Movants' pleadings and arguments, and I think
23 even representations to the District Court, have been they
24 have these sacred jury trial rights, these inviolate jury
25 trial rights, and an Article I Court like this Court should

1 have no business through a gatekeeping provision impinging on
2 the possible pursuit of an action where there's a jury trial
3 right.

4 I was surprised initially when I thought about this. I
5 thought, wow, I've seen so many agreements over the months. I
6 can't say every one of them waived the jury trial right, but I
7 just remembered seeing that a lot, and seeing arbitration
8 provisions, and so that's why I asked. It just was lingering
9 in my brain. So I'm going to look at what is submitted. I'm
10 not relying on that as part of my ruling. As you just heard,
11 I had a multi-part ruling, and whether there's a jury trial
12 right or not is irrelevant to how I'm choosing to rule on this
13 motion. But I do want to see the agreement, and then I want
14 Movants within 10 days to respond with a post-hearing trial
15 brief either saying you agree that this is the controlling
16 document or you don't agree and explain the oversight, okay?
17 Because it feels like a gross omission here to have such a
18 strong theme in your argument -- we have a jury trial right,
19 we have a jury trial right, by God, the gatekeeping
20 provisions, among other things, impinge on our sacred pursuit
21 of our jury trial right -- and then maybe it was very
22 conspicuous in the controlling agreement that you'd waived
23 that, the Movants had waived that.

24 So, anyway, I'm requiring some post-hearing briefing, if
25 you will, on whether omissions, misrepresentations were made

1 to the Court.

2 Anyway, so I reserve the right to supplement or amend this
3 ruling with a more fulsome written order. I am asking Mr.
4 Pomerantz to upload a form of order that is consistent with
5 this ruling, and --

6 MR. POMERANTZ: Your Honor, we will do so. I do have
7 one thing to bring to the Court's attention, unrelated to the
8 motion, before Your Honor leaves the bench.

9 THE COURT: All right. So just a couple of follow-up
10 things. Have you -- I'm not clear I heard what you said about
11 this agreement. Did you email it to my courtroom deputy or
12 did you file it on the docket?

13 MR. POMERANTZ: We emailed it to your courtroom
14 deputy. We're happy to file it on the docket. And we also
15 provided a copy to Mr. Sbaiti.

16 I would note for the Court that it's signed both by The
17 Charitable DAFs by Grant Scott, just for what it's worth.

18 THE COURT: Okay. All right. Well, I'm trying to
19 think what I want -- I do want you to file it on the docket,
20 and I'm trying to think of what you label it. Just call it
21 Post-Hearing Submission or something and link it to the motion
22 that we adjudicated here today. And then, again, you've got
23 10 days, Mr. Bridges, to say whatever you want to say about
24 that agreement.

25 I guess the last thing I wanted to say is we sure devoted

1 a lot of time to this motion today. We have -- this is a
2 recurring pattern, I guess you can say. We have a lot of
3 things that we devote a lot of time to in this case that I get
4 surprised, but it is what it is. You file a motion. I'm
5 going to give it all the attention Movants and Respondents
6 think it warrants. I'm going to develop a full record,
7 because, you know, there's a recurring pattern of appeals
8 right now, 11 or 12 appeals, I think, not to mention motions
9 to withdraw the reference. If we're going to have higher
10 courts involved in the administration of this case, I'm going
11 to make a very thorough record so nobody is confused about
12 what we did, what I considered, what my reasoning was.

13 So I kind of think it's unfortunate for us to have to
14 spend case resources and so much time and fees on things like
15 this, but I'm going to make sure a Court of Appeals is not
16 ever confused about what happened and what we did. So that's
17 just the way it's going to be. And I feel like we have no
18 choice, given, again, the pattern of appeals.

19 All right. So, with that, Mr. Pomerantz, you had one
20 other case matter, you said?

21 MR. POMERANTZ: Yes. But before I get to that, Your
22 Honor, I assume that, in response to the Movants' submission
23 on the agreement, that we would have right at four or seven
24 days to respond if we deem it's appropriate?

25 THE COURT: I think that's reasonable. That's

1 reasonable.

2 MR. POMERANTZ: Okay. Thank you, Your Honor.

3 THE COURT: So let me think of how I want to do this.
4 I'll just do a short scheduling order of sorts that just, it
5 says in one or two paragraphs, at the hearing on this motion,
6 the Court raised questions about the jury trial rights and the
7 Debtor has now submitted the controlling agreements, I'm
8 giving the Movants 10 days to respond to whether this is
9 indeed a controlling agreement, and why, if it is, the Movants
10 have heretofore taken the position they have jury trial
11 rights. And then I will give you seven days thereafter to
12 reply, and then the Court will set a further status conference
13 if it determines it's necessary. Okay?

14 So, Nate, we'll do a short little order to that effect.
15 Okay?

16 MR. POMERANTZ: Thank you, Your Honor.

17 I -- again, before I raise the other issue, I want to pick
18 up on a comment Your Honor just made towards the end. I know
19 the Court has been frustrated with the time and effort we've
20 been spending. The Debtor and the creditors have been
21 extremely frustrated, because in addition to the time and
22 effort everyone's spending, we're spending millions of
23 dollars, millions of dollars on litigation that --

24 THE COURT: It's one of the reasons you needed an
25 exit loan, right?

1 MR. POMERANTZ: Right. No, exactly. That's
2 frivolous, that we think is made in bad faith.

3 And Your Honor, and everyone else who's hearing this on
4 behalf of Mr. Dondero, should understand we're looking into
5 what appropriate authority Your Honor would have to shift some
6 of the costs. Your Honor did that in the contempt motion.
7 Your Honor can surely do that in connection with the notes
8 litigation. But all this other stuff that is requiring us to
9 spend hundreds and hundreds of hours and spend millions of
10 dollars, we are clearly looking into whether it would be
11 appropriate and what authority there is. I just wanted to let
12 Your Honor know that.

13 And in connection with that, the last point, Your Honor, I
14 can't actually even believe I'm saying this, but there was
15 another lawsuit filed -- we just found out in the break -- on
16 Wednesday night by the Sbaiti firm on behalf of Dugaboy in the
17 District Court.

18 Now, to make matters worse, Your Honor, the litigation
19 relates to alleged improper management by the Debtor of Multi-
20 Strat. If Your Honor will recall, at many times I've told
21 this Court what Dugaboy's claims they filed in this case.
22 Dugaboy has a claim that is filed in this case for
23 mismanagement postpetition of Multi-Strat. Now the Sbaiti
24 firm, in addition to representing CLO Holdco, in addition to
25 representing the DAF, and whatever the Plaintiffs' lawyers are

1 in that other District Court, PCMG, and in connection with the
2 Acis matter, they've decided they haven't had enough. They've
3 now filed another motion that -- you know, why they filed it
4 in District Court and there's a proof of claim on the same
5 issues, I don't know. But I thought Your Honor should know.
6 I'm not asking Your Honor to do anything about it. But we
7 will act aggressively, strongly, and promptly.

8 Thank you, Your Honor.

9 THE COURT: All right. Well, you've reminded me of
10 what came out earlier today about the entity -- I left my
11 notepad in my chambers -- PMC or PMG or something.

12 Mr. Bridges, we're not going to have a hearing right now
13 on me doing anything, but what are you thinking? What are you
14 doing?

15 MR. BRIDGES: Your Honor, I'm not trying to duck your
16 question. I literally have no involvement with any other
17 claim, and we would have to ask Mr. Sbaiti to answer your
18 questions.

19 THE COURT: All right. Is he there?

20 MR. BRIDGES: He is.

21 THE COURT: I'll listen.

22 MR. BRIDGES: I'll switch seats and give him this
23 chair.

24 MR. SBAITI: Sorry, Your Honor. We had two computers
25 going and weren't able to use the sound on one, so we ended up

1 turning that off.

2 Your Honor, I'm not sure what the question is about when
3 you say what are we thinking. We have a client that's asked
4 us to file something, and when we're advised by bankruptcy
5 counsel that it's not prohibited for us to do so, and don't
6 know why we're precluded from doing so, and when the time
7 comes I'm sure we'll be able to explain to Your Honor --
8 someone will be able to explain to Your Honor why what we're
9 doing, despite Mr. Pomerantz's exacerbation, or excuse me,
10 exasperation, why that wasn't improper. It's our belief that
11 it wasn't improper or a violation of the Court's rule.

12 THE COURT: Just give me a quick shorthand *Readers'*
13 *Digest* of why you don't think it's improper.

14 MR. SBAITI: Sure. My understanding is, Your Honor,
15 there's not a rule that says we can't file it against the
16 Debtor for postpetition actions. So that, that's as -- that's
17 as much as I understand. And I'm going to -- I'm not trying
18 to duck it, either. And if I'm wrong about that and someone
19 wants to correct me on our side offline and if we have to
20 explain to the Court why that's so or what rule has been
21 violated, I'm sure we'll be able to put together something for
22 that. But that's what I've been advised.

23 THE COURT: Have you done thorough --

24 MR. POMERANTZ: Your Honor, I think what --

25 MR. SBAITI: (garbled), Your Honor.

1 THE COURT: Have you done thorough research yourself?
2 Your Rule 11 signature is on the line, not some bankruptcy
3 counsel you talked to. Have you done the research yourself?

4 MR. SBAITI: Well, Your Honor, I've relied on the
5 research and advice of people who are experts, and I believe
6 my Rule 11 obligations also allow me to do that, so yes.

7 MR. POMERANTZ: Your Honor, I think we're entitled to
8 know if it's Mr. Draper's firm who has been representing
9 Dugaboy. He's the bankruptcy counsel. I don't think it's an
10 attorney-client privilege issue. If Mr. Sbaiti is going to be
11 here and sort of say, hey, bankruptcy counsel said it was
12 okay, I think we would like to know and I'm sure Your Honor
13 would like to know who is that bankruptcy counsel.

14 THE COURT: Yes. Fair enough. Mr. Sbaiti?

15 MR. SBAITI: Your Honor, in consultation with Mr.
16 Draper and with consultation with other counsel that we've
17 spoken to, that has been our understanding.

18 THE COURT: Who's the other counsel?

19 MR. SBAITI: Well, we've talked to Mr. Rukavina about
20 some of these things for the PCMG and the Acis case. We've
21 talked to the people who, when they tell us you can't do this
22 because they're bankruptcy counsel for our client, then we
23 don't do something. So, and I'm not trying to throw anybody
24 under the bus, but my understanding of what goes on in
25 Bankruptcy Court is incredibly limited, so, you know, and if

1 it's a mistake then I'll own it, if I have a mistaken
2 understanding, but I also wasn't anticipating having to make a
3 presentation about this right here right now, so --

4 THE COURT: Well, you're filing lawsuits that involve
5 this bankruptcy case during the hearing, so --

6 MR. SBAITI: Oh, we didn't file it during the
7 hearing, Your Honor. It was filed last night, I believe.

8 THE COURT: Okay. Well, I assume that you're going
9 to go back and hit the books, hit the computer, and be
10 prepared to defend your actions, because your bankruptcy
11 experts, they may think they know a lot, but the judge is not
12 very happy about what she's hearing.

13 MR. POMERANTZ: Your Honor, if I may ask when Your
14 Honor intends to issue the contempt ruling in connection with
15 the June 8th hearing? I strongly believe -- and, obviously,
16 this has nothing to do with the contempt hearing; this
17 happened after -- but I strongly believe that sending a
18 message that Your Honor is inclined to hold counsel in
19 contempt, which obviously is one of the violators we said
20 should be held in contempt, it may be important to do that
21 sooner rather than later so that people know that Your Honor
22 is serious.

23 THE COURT: All right. Well, I understand and
24 respect that request. And let me tell you all, I had a seven-
25 day -- okay. You all were here on that motion June 8th. I

1 had a seven-day, all-day, every-day, 9:00 to 5:00, 45-minute
2 lunch break, in-person hearing with a dozen or so live
3 witnesses that I just finished Tuesday at 5:00 o'clock. So
4 you all were here on the 8th, and then -- what day was that --
5 what was -- Tuesday, I finished. Tuesday was the 22nd. So I
6 started on the 14th, okay? So you all were here on the 8th
7 and I had a live jury trial -- I mean, not jury trial, a live
8 bench trial -- live human beings in the courtroom, beginning
9 June 14th. So you're here the 8th. June 14th through 22nd, I
10 did my trial. And here we are on the 25th. And guess what, I
11 have another live human-being bench trial next week, Monday
12 through Friday.

13 So we've been working in other things like this in between
14 those two. So I'm telling you that not to whine, I'm just
15 telling you that, that's the only reason I didn't get out a
16 quick ruling on this, okay?

17 MR. POMERANTZ: And Your Honor, I was not at all
18 making that comment to imply anything about the Court.

19 THE COURT: Well, --

20 MR. POMERANTZ: The time and effort that you have
21 given to this case is extraordinary, --

22 THE COURT: Okay.

23 MR. POMERANTZ: -- so please don't misunderstand my
24 comment.

25 THE COURT: Okay. And I didn't mean to express

1 annoyance or anything like that. I guess what I'm trying to
2 do is I don't want anyone to mistake the delay in ruling on
3 the contempt motion to mean I'm just not that -- you know, I'm
4 not prioritizing it, other things are more serious to me or
5 important to me, or I'm going to take two months to get to it.
6 It's literally been I've been in trial almost all day long
7 every day since you were here. But trust me, I'm about as
8 upset as upset can be about what I heard on June 8th, and I'm
9 going to get to that ruling, and I know what I'm going to do.
10 And, well, like I said, it's just a matter of figuring out
11 dollars and whom, okay? There's going to be contempt. I just
12 haven't put it on paper because I've been in court all day and
13 I haven't come up with a dollar figure. Okay?

14 So I hope -- I don't know if that matters very much, but
15 it should.

16 All right. We stand adjourned.

17 (Proceedings concluded at 3:35 p.m.)

18 --oOo--

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

06/29/2021

24 _____
25 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

_____ Date

003676

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EXHIBIT 22

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE: . Case No. 19-34054-11 (SGJ)
HIGHLAND CAPITAL .
MANAGEMENT, L.P., .
Debtor. .
CHARITABLE DAF FUND, LP,
et al.,
Plaintiffs, . . Earle Cabell Federal Building
v. 1100 Commerce Street
Dallas, Texas 75242
HIGHLAND CAPITAL, .
MANAGEMENT, L.P., et al., .
Defendants. Tuesday, November 23, 2021
9:40 a.m.

TRANSCRIPT OF HEARING ON
PLAINTIFFS' MOTION TO STAY ALL PROCEEDINGS (55);
PLAINTIFFS' MOTION TO STRIKE REPLY APPENDIX (47); AND
DEFENDANTS' MOTION TO DISMISS COMPLAINT (26)

**BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT JUDGE**

TELEPHONIC APPEARANCES CONTINUED ON NEXT PAGE.

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produced by a transcript service.

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003679

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1 THE COURT: Good morning. Please be seated.

2 All right. We have a setting in the Charitable DAF
3 Fund, et al., v. Highland, Adversary 21-3067. We have three
4 motions that are set.

5 Let me get appearances from the Plaintiffs' counsel
6 first. Go ahead.

7 MR. SBAITI: Good morning, Your Honor. This is Mazin
8 Sbaiti for the Plaintiffs.

9 THE COURT: Okay. Thank you.

10 Now for the Defendants, who do we have appearing?

11 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
12 Pomerantz and John Morris from Pachulski Stang Ziehl & Jones.
13 Your Honor, before -- I understand Your Honor is going to take
14 up the motion to stay first.

15 Before Your Honor does so, I have a procedural issue
16 relating to that motion that I would like to address the Court
17 after appearances are made.

18 THE COURT: All right. I assume that's all the
19 lawyer appearances for this adversary.

20 MR. JORDAN: Your Honor?

21 THE COURT: Oh, go ahead.

22 MR. JORDAN: Your Honor, we are a nominal defendant,
23 but John Jordan on behalf of Highland CLO Funding, Ltd.

24 THE COURT: Okay. Thank you. Sorry about that.

25 MR. BESSETTE: And, Your Honor, Paul Bessette, Mr.

1 Jordan's colleague is on the phone, as well.

2 THE COURT: Okay. Thank you.

3 All right. Anyone else I missed?

4 (No audible response)

5 THE COURT: All right. Mr. Pomerantz, your
6 procedural issue?

7 MR. POMERANTZ: Thank you, Your Honor.

8 Your Honor, I must once again bring to this Court's
9 attention a violation of the Court Rules by the various counsel
10 representing Mr. Dondero. This time it's by Mr. Sbaiti.

11 When the district court entered its order granting
12 Highland's motion to enforce the reference and referring this
13 matter to Your Honor, there were three matters on the Court's
14 docket, district court's docket that got transferred. First
15 was the motion to dismiss, second was the motion to stay, and
16 third was the motion to strike, which essentially has been
17 rendered moot.

18 The briefing was complete with respect to the first
19 two matters, the motion to dismiss and the motion to stay. And
20 all that remained for the Court to do was to set a hearing and
21 have oral argument. Your Honor, on October 13th, Your Honor
22 set a hearing for today for each of those two motions.
23 Nevertheless, on November 10th, almost a month after the Court
24 set the matters for hearing and after pleadings were closed,
25 Plaintiffs filed what they called their amended motion to stay.

1 As an initial matter, Your Honor, the amended motion
2 was not even filed in this adversary proceeding initially. It
3 was filed in the main case, and there was an error that Mr.
4 Sbaiti corrected on November 18th, five days before this
5 hearing. Plaintiff did not ask for leave of court to file any
6 further pleadings. They did not provide the time under the
7 local rules for response. And, in fact, they raised additional
8 arguments in their amended motion.

9 Well, Your Honor, we can certainly argue to the Court
10 that the amended motion constitutes a new motion, is untimely,
11 and the hearing should be continued to allow us to file a
12 response. We're not going to do that, Your Honor. As I will
13 discuss when it's my time to response substantively to the
14 motion, the new arguments to stay the proceedings, the amended
15 motion are equally as frivolous as the arguments contained in
16 the original motion.

17 But I bring this to the Court's attention because,
18 again, it's extremely frustrating to have the lawyers
19 representing Mr. Dondero's related entities continue to act as
20 if the rules do not apply to them. Your Honor will recall just
21 a week or so ago, Your Honor made a -- we had a similar issue
22 in connection with the motion to dismiss. Failure to follow
23 the rules is unprofessional, and it's disrespectful not only to
24 Highland's professionals but also to the Court and it
25 interferes with Your Honor's ability to control your docket and

1 sufficiently prepare for contested matters.

2 At some point, Your Honor, there should be real
3 consequences for the continued violation of the rules. Having
4 said that, Your Honor, we are prepared to go forward with the
5 motion to stay today.

6 THE COURT: All right. Mr. Sbaiti, what say you?
7 I'm looking at Docket Entry Number 69 in the adversary
8 proceeding that was filed last Thursday. So, obviously, very,
9 very late in the game, shall we say. What is your response to
10 this?

11 MR. SBAITI: Your Honor, that was not filed in the
12 adversary as an error. When we asked one of our paralegals to
13 file it, we're not as familiar with the bankruptcy court system
14 and it was an error. It was corrected once the lawyers
15 realized it, which was last -- which was on November the 18th.
16 It was filed in, I guess in the main case. But it was simply
17 an inadvertent error, Your Honor.

18 MR. POMERANTZ: I would add, Your Honor, the original
19 motion filed inadvertently was November 10th. It still was not
20 timely. I think Mr. Sbaiti needs to answer the question of why
21 that was filed untimely, okay.

22 THE COURT: All right. Thank you, Mr. Sbaiti.

23 So, one of my pet peeves in life is people blaming
24 paralegals, by the way. But be that as it may, as Mr.
25 Pomerantz points out that it was still untimely the motion

1 filed in the underlying bankruptcy case November 10th. So what
2 is your --

3 MR. SBAITI: Your Honor, when we looked at the motion
4 and looked at the progression of the case, we filed an amended
5 motion simply to clarify our position. And really I don't
6 think we've changed our arguments all that much. We simply
7 clarified our position. We've seen amended motions filed in
8 the bankruptcy in our prior dealings, and so at that point, we
9 felt like there wasn't a rule explicitly saying we couldn't
10 have an amended motion.

11 But if it's untimely, Your Honor, you know, we don't
12 think it changes the underlying arguments. As Mr. Pomerantz
13 said, we don't think there's any prejudice to Highland either.

14 THE COURT: All right. Well, just to be clear, you
15 know, it's one thing in an underlying bankruptcy case to file
16 an amended motion after you've gotten a motion set for hearing
17 that might slightly adjust, you know, facts or relief sought.
18 And, of course, we independently look at it when it happens in
19 an underlying case to see do we need more notice to affected
20 parties.

21 But in an adversary proceeding, you know, you just
22 don't do this. All right? If you have some sort of
23 exceptional circumstances, you can file I guess a motion to
24 amend because I got to include this new information that didn't
25 exist. But you just don't do this, okay?

1 So I don't -- could you be clear what was the new
2 information? What was the new information that had to be
3 brought before the Court suddenly?

4 MR. SBAITI: Your Honor, there wasn't new
5 information. We were simply giving notice of our understanding
6 of where the legal arguments were going. The reason being is
7 that after those motions were filed and recently, the debtor
8 took the position in two other cases that they should be
9 dismissed pursuant to the permanent injunction.

10 And so that clarified for us at least a couple of
11 arguments that were unclear to us where the debtor stood on
12 whether or not the permanent injunction would be a basis to
13 dismiss or stay any of the claims that were pending. There are
14 two other claims pending in district court. Since we had filed
15 that motion, the debtor filed a motion to reconsider the stays
16 that were granted in those two courts. And then they also
17 moved to dismiss on the basis of the permanent injunction.

18 And so given that the debtor took the position that
19 they were willing to dismiss those cases based upon the
20 permanent injunction, it in many ways contravenes the position
21 they took in response to our motion which is that the -- for
22 example, they somewhat take the position in Paragraph 22, it
23 wasn't as clear then but it's clear -- it seems clearer now
24 that the permanent injunction is not relevant to whether or not
25 the case can go forward in any capacity.

1 And so we simply wanted to incorporate that, but it's
2 mainly legal argument about the choices that are before the
3 Court. That was really it. I mean, theoretically, I would
4 have made them for the first time during oral argument and we
5 thought we were doing something good by giving -- apprising the
6 Court in writing and giving notice of these arguments to the
7 other side by filing an amended motion. We didn't add new
8 evidence or anything like that.

9 MR. POMERANTZ: Your Honor, that argument is
10 completely disingenuous because our motion to dismiss and
11 motion for reconsideration that Mr. Sbaiti refers to is several
12 weeks ago, okay. It wasn't November 10th. It was several
13 weeks ago.

14 I will respond substantively why Mr. Sbaiti is wrong
15 and there's no inconsistent positions when it's my time to
16 speak. But for Mr. Sbaiti to say he was doing us a favor and
17 he was reacting to recent new information is just wrong, Your
18 Honor. And they should just not be continued to allowed to get
19 away with flouting the rules.

20 THE COURT: All right. Well, let me just say I'm
21 confused, maybe I should say baffled, about this amended
22 motion. You know, the motion to dismiss that is before the
23 Court for oral argument today isn't about the injunction, isn't
24 about the plan injunction. It's about res judicata and other
25 12(b) (6) arguments.

1 So I'm confused and I think, you know, it's been
2 clear for many months in this adversary proceeding, in
3 particular, the debtor's position on the plan injunction,
4 particularly, you know, in the whole argument on the motion to
5 leave to add Mr. Seery as a defendant.

6 So I'm confused, but we're going to go forward on the
7 argument today, whatever argument you want to make. And you've
8 been, I guess, forewarned. I will say that these last-minute
9 amended motions are not going to be tolerated, are not going to
10 be considered. And so, you know, I hope you won't do it again.
11 Your firm has already been sanctioned once in this adversary
12 proceeding. I'm sure we all remember.

13 So, you know, I'm just kind of baffled why you would
14 take a chance filing an amended motion without leave or somehow
15 getting it to the attention of the Court or running it by the
16 other parties for their consent to you doing it. But we're
17 going to go forward and just hear the arguments, okay. And so
18 --

19 MR. SBAITI: Thank you.

20 THE COURT: -- I'll hear your argument.

21 I'm letting people know I don't know where this time
22 estimate came on the calendar today, three hours. I don't know
23 if someone specifically expressed that. But I'm letting you
24 know at noon I have a swearing-in ceremony that I'm doing back
25 in my chambers. So I will stop at noon Central time.

1 And so does anyone think that's going to be a
2 problem?

3 MR. SBAITI: It should not be, Your Honor, from our
4 perspective.

5 THE COURT: Mr. Pomerantz?

6 MR. POMERANTZ: I don't believe so. Mr. Morris is
7 going to handle the motion to dismiss which is going to be the
8 bulk. My presentation on the motion to stay is only going to
9 be around ten minutes or so.

10 THE COURT: Okay. Thank you.

11 Mr. Sbaiti, your argument on the motion for stay.

12 MR. SBAITI: Thank you, Your Honor.

13 Your Honor, may I share my screen?

14 THE COURT: You may.

15 MR. SBAITI: I have a PowerPoint that can kind of --

16 THE COURT: Okay. You may.

17 MR. SBAITI: -- walk us through. Thank you.

18 Is Your Honor able to see my screen?

19 THE COURT: I can, yes.

20 MR. SBAITI: Thank you, Your Honor.

21 Your Honor, what I would point you to is, first, the
22 injunction language. This is what Your Honor's permanent
23 injunction says, and this is really what animates our motion to
24 stay. Our motion to stay is derived specifically because my
25 clients and I feel like our case has been enjoined by this

1 injunction, if not completely disposed of.

2 The language says that we're an enjoined:

3 "An enjoined party is permanently enjoined from
4 commencing, conducting, or continuing in any manner
5 any suit, action, or other proceeding of any kind
6 including any proceeding in a judicial, arbitral,
7 administrative, or other forum against or affecting
8 the debtor or the property of the debtor."

9 And then (v) of that injunction says:

10 "or acting or proceeding in any manner in any place
11 whatsoever that does not conform to or comply with
12 the provisions of the plan."

13 One of the things that was suggested in Paragraph 22
14 of their response was that the DAF and Holdco are not enjoined
15 parties. But the final plan defines an enjoined party in
16 Article 1(b) (56) as any entity who has or -- all entities who
17 have held, hold, or may hold claims against the debtor; any
18 entity that has appeared and/or filed any motion, objection, or
19 other pleading in this Chapter 11 case regardless of the
20 capacity in which such entity appeared and any other party in
21 interest. And, five, the related persons of each of the
22 foregoing.

23 Article 1(b) (22) defines a claim as any claim that's
24 defined in Section 1015 of the Bankruptcy Code. And Section
25 1015 of the Bankruptcy Code defines a claim as a right to

1 payment whether or not such right is reduced to judgment,
2 liquidated, unliquidated, fixed, contingent, matured,
3 unmatured, disputed, undisputed, legal, equitable, secured, or
4 unsecured.

5 So given this definition, when we've read this
6 injunction, we believed that we were enjoined parties, the DAF
7 and Holdco were both enjoined parties. They had appeared in
8 the -- they have claims. Obviously, those are the claims being
9 asserted here.

10 And so going back to the injunction language, we
11 believe this lawsuit has been disposed of by this permanent
12 injunction. We believe there's really only one or two things
13 that should probably happen with this lawsuit. Either it could
14 be dismissed based upon the permanent injunction or what we
15 proposed in our motion to stay is that the Court exercise its
16 inherent authority to simply stay the case pending the appeal
17 of this language, which is up on appeal in the Fifth Circuit
18 right now.

19 If that language, and if the injunction gets affirmed
20 by the Fifth Circuit, then certainly the dismissal can happen
21 once that affirmance happens and there's no harm, no foul, and
22 no one's wasted any time.

23 If they're not, if it's overturned, then, obviously,
24 the injunction would be vacated, presumably by the Fifth
25 Circuit. And at some point, if the Court decides not to enter

15

1 a similar injunction that would likewise dispose of this case,
2 then the case could proceed on the merits.

3 The issue we've identified both in our original
4 motion and as we fleshed out in our -- as a matter of law in
5 our amended motion to simply put a finer point on it is that
6 the merits are now -- have been disposed of. This injunction
7 ends this case, at least as far as we read it. It ends this
8 case irrespective of the underlying merits of the lawsuit,
9 which means that the lawsuit merits themselves have become moot
10 and any opinion or any attempt to resolve it is obviously an
11 advisory opinion by the Court.

12 So we really only see two ways that this could go
13 right now without either gutting the injunction or
14 circumventing it completely, which is to say that either the
15 case should be dismissed based upon the permanent injunction or
16 the case should be stayed based upon the permanent injunction.

17 Mr. Pomerantz or the debtors' brief suggests that,
18 well, the injunction doesn't prevent hearing pending motions.
19 But I would respectfully disagree with that. If you look at
20 the language, "commencing, conducting, or continuing in any
21 manner in any suit, action, or other proceeding against or
22 affecting the debtor."

23 As 12(b)(6) hearing, I would imagine, was intended to
24 fall under the umbrella of a proceeding. And us arguing a
25 12(b)(6) motion would us be conducting and maybe even

16

1 continuing the suit because we're trying to protect the merits
2 of the suit, which as I said are at this juncture already moot.

3 And so it comes down to I think a very simple
4 question, which is what do we do at this juncture. Do we just
5 simply dismiss the lawsuit in light of this permanent
6 injunction or stay the lawsuit in light of this permanent
7 injunction?

8 The debtor makes a lot of hay out of the fact that,
9 well, there are special rules that apply when you're trying to
10 stay a case pending appeal. But if you look at all of their
11 case law, it has to do with different circumstances where an
12 appeal -- where there's a matter on appeal that could
13 substantially affect the resolution of the case, which here we
14 think it actually could. But in those cases, those appeals
15 would affect the resolution of the case on the merits; whereas,
16 here, the question goes to whether or not a permanent
17 injunction that really has stopped us all in our tracks.

18 As soon as we understood this injunction and its
19 scope, we're the ones who reached out to the debtor's counsel
20 and asked them on a meet-and-confer whether or not they would
21 just agree to stay the matter. And we were a little bit
22 surprised by their reaction when they first didn't think that
23 this applied to our case, and we didn't understand how. And
24 then they changed their mind, said it did apply to our case but
25 they didn't think that we should stay the case. And they

1 didn't suggest let's just dismiss it based upon the permanent
2 injunction.

3 So it kind of comes down to the same small -- same
4 simple issue, Your Honor. There's this permanent injunction,
5 and I don't think there's any way for us to get around it at
6 this juncture.

7 THE COURT: Mr. Pomerantz:

8 MR. POMERANTZ: Yes, Your Honor.

9 I'm going to respond to several of the arguments Mr.
10 Sbaiti made in his motion, which apparently he's abandoned
11 because he only is focused on the injunction. And I'm also
12 going to tell Your Honor, what our arguments are because
13 despite Mr. Sbaiti's efforts, he's completely misquoted them.

14 So in the motion and the amended motion, the
15 Plaintiffs make several arguments why this Court should stay
16 the matter. First, they argue they're entitled to a stay
17 because the exculpation provision in the plan prohibits them
18 from proceeding against the Defendants in the action. And
19 there are several problems with that argument.

20 First, Mr. Sbaiti and the Plaintiffs don't even
21 attempt to meet the Fifth Circuit's standards for a stay
22 pending appeal because, of course, they can't. Mr. Sbaiti's
23 trying to sidestep the grounds for a stay pending appeal by
24 arguing it doesn't apply just is incorrect.

25 They would have to show that there is a likelihood of

1 success on the merits, they would suffer irreparable harm, the
2 debtor wouldn't suffer irreparable harm, and there is -- public
3 interest supports a stay. They can't do any of them.

4 In fact, as Your Honor is well aware, Your Honor
5 denied the actual appellants in that suit, in that order, the
6 confirmation order, a stay pending appeal and that was denied
7 by the district court and also denied by the Fifth Circuit
8 Court of Appeals.

9 The Plaintiffs didn't object to the plan, they are
10 not parties to the appeal, and they never sought a stay pending
11 appeal. So they really can't explain why they as really
12 strangers to the appeal are entitled to a stay of the
13 effectiveness of the plan when the actual appellants to that
14 order were denied a stay pending appeal up through the
15 appellate ladder.

16 Second, notwithstanding Mr. Sbaiti's arguments in the
17 motion, the exculpation provision is neither as broad nor does
18 it affect all the parties that are subject to this litigation.
19 There are three Defendants in the complaint. The only
20 Defendant that is covered by the exculpation provision is the
21 debtor. The exculpation provision does not apply HCF Advisors,
22 and it does not apply to Highland CLO Funding.

23 Also, while the exculpation provision does apply to
24 the debtor, it only exculpates the debtor from claims of
25 negligence. The complaint raises a variety of causes of action

1 that have nothing to do with negligence and would not be
2 covered by the exculpation provision.

3 But, Your Honor, the biggest problem with their
4 argument that the exculpation provision supports a stay is that
5 the exculpation -- the appeal of the exculpation provision has
6 nothing to do with this case. Why? Because the Fifth Circuit
7 appeal concerns whether the exculpation provision is
8 appropriate for parties other than the debtor. The debtor is
9 the only Defendant in this case that obtains the benefit of the
10 exculpation.

11 And there is no dispute, there was no dispute at
12 confirmation, there's no dispute in the case law, there's no
13 dispute in Pacific Lumber, there's no dispute in the appeal
14 that a plan can exculpate the debtor. So the Fifth Circuit
15 appeal doesn't implicate the exculpation provision and cannot
16 support a basis for a stay.

17 The next argument Mr. Sbaiti makes is the injunction
18 provision, and the injunction provision is on appeal to the
19 Fifth Circuit. But the aspect of the appeal of the injunction
20 is not the provision that Mr. Sbaiti points to.

21 And, again, as with the exculpation provision, the
22 same arguments about failure to obtain a stay, failure to be
23 party to the appeals, and failure to object to the plan apply,
24 as well. But as is the case with the exculpation provision,
25 the resolution of the appeal of the injunction provision will

1 not affect this case in any way.

2 They point to the portion of the injunction that
3 prohibits enjoined parties from directly or indirectly
4 continuing, commencing, or conducting in any manner any suit or
5 action proceeding against the debtor. They argue that they
6 cannot proceed without violating the injunction because the
7 injunction was intended to put all litigation against the
8 debtor to an end.

9 But, of course, Your Honor, that is not true. That
10 is not what the injunction is. The issue on appeal before the
11 Fifth Circuit as it relates to the injunction is whether the
12 injunction impermissibly enjoins parties from enforcing their
13 rights with respect to post-effective date commercial
14 relationships with the reorganized debtor. And, of course, we
15 argue that it's appropriate, but it has nothing to do with the
16 provision Mr. Sbaiti identified.

17 The appeal does not impact in any way whether a plan
18 can enjoin prosecution of claims that arose prior to the
19 effective date. And, of course, such a plan provision is
20 completely appropriate and is customary. The plan provided the
21 debtor as the plan provides all debtors with a fresh start and
22 enjoins litigation against the debtor.

23 But importantly, Your Honor, that does not mean as
24 Plaintiffs argue that any liability for pre-effective date
25 conduct just goes away and that creditors are left without a

1 remedy to pursue claims against the debtor for pre-effective
2 date conduct.

3 Rather, if they have a pre-petition claim in lieu of
4 their litigation that's pending, they file a pre-petition claim
5 against the estate and that matter is resolved in the claims
6 objection procedure. Or, as in the case here, when they make
7 an allegation that there is a post-petition claim, what do they
8 do? They file a request for payment of an administrative
9 claim, and this Court addresses the validity of the
10 administration claim. The lawsuit pending in another
11 jurisdiction stops, but the claim has to be resolved in the
12 bankruptcy court.

13 The only conduct that the injunction really prohibits
14 is them from proceeding with actions in other courts. It does
15 not deny them a remedy. Accordingly, their argument that they
16 cannot proceed with claims against the debtor because of the
17 injunction provision just lacks any merit and can't form the
18 basis for a stay.

19 Plaintiffs' next argument in their briefing is that
20 if the Court refuses to stay the complaint, they will file a
21 motion to withdraw the reference of this matter to the district
22 court. Your Honor, this is the biggest head-scratcher of them
23 all given how this complaint ended up before Your Honor. This
24 exact issue and Plaintiffs' arguments as to why the reference
25 should be withdrawn have already been fully briefed and decided

1 by the district court.

2 As Your Honor may recall, the Plaintiff filed this
3 action in the district court, conveniently failing to include
4 the bankruptcy case as a related case or mentioning that the
5 bankruptcy courts have related jurisdiction in the filings.
6 Your Honor may have had occasion to review the underlying
7 complaint when the debtor brought a motion for contempt against
8 counsel for Plaintiffs for pursuing a claim against Mr. Seery
9 in violation of Your Honor's January 9th, 2020 and July 16th,
10 2020 orders.

11 Your Honor issued an order finding counsel and
12 various parties in contempt which order is, of course, subject
13 to appeal. At the time we were litigating the contempt motion,
14 we filed two motions in district court. The first was a motion
15 to enforce the reference and have the district court send that
16 complaint to Your Honor. And that motion to enforce the
17 reference is now on Your Honor's docket at Number 22 and 23.

18 The second was the motion to dismiss which is before
19 Your Honor today. Plaintiffs oppose the motion to enforce the
20 reference arguing that mandatory withdrawal was required
21 because the matter involved consideration of non-bankruptcy
22 federal law, specifically federal securities laws and the
23 Investment Advisors' Act.

24 Plaintiffs further argue to the district court why
25 would you refer the case to the bankruptcy court if it's only

1 going to end up back in the district court upon mandatory
2 withdrawal of the reference. They argue to the district court
3 that would be a complete waste of time.

4 We filed our reply at Docket Number 42 explaining to
5 the district court why mandatory withdrawal of the reference
6 did not apply and why this case should be referred to Your
7 Honor. And what did the district court subsequently do? It
8 entered an order referring this action to Your Honor which is
9 why we are here today.

10 Plaintiffs now flout the district court's order of
11 reference by telling the Court that if the Court does not stay
12 the matter, they will file a motion to withdraw the reference
13 before Your Honor, and they attach virtually identical pleading
14 that they filed in opposition to our motion to enforce the
15 reference.

16 Plaintiffs did not disclose in their amended motion
17 that there was a fully-briefed motion to enforce the reference
18 before the district court. Plaintiffs' argument is
19 disingenuous and designed to mislead the Court.

20 The district court has only agreed that mandatory
21 withdrawal of the reference does not apply and this case
22 belongs in Your Honor. And while we cannot stop the Plaintiffs
23 from filing any motion before this Court, we want to put them
24 on notice that if they do file a motion for withdrawal of the
25 reference in light of the facts as I just stated them, we will

1 seek sanctions.

2 In any event, Your Honor, the fact that they may file
3 a motion for withdrawal of the reference at some point in the
4 future is not grounds to stay the matter.

5 Lastly, Your Honor, Plaintiffs argued in the opening
6 that Highland's position today in opposing the motion to stay
7 is inconsistent with positions Highland has taken in two other
8 lawsuits commenced by the Sbaiti firm. Like all of their other
9 arguments, they misrepresent the facts and are frivolous.

10 The Sbaiti firm filed a complaint on behalf of the
11 DAF in the district court arguing that Highland mismanaged
12 (audio drop). That complaint followed in the heels of an
13 almost identical complaint filed by Dugaboy asserting the same
14 claims.

15 And Your Honor may recall questioning Mr. Sbaiti at a
16 hearing in June how Dugaboy could pursue such a claim in the
17 district court if Dugaboy had a pending proof of administrative
18 claim on file in the bankruptcy case. Well, soon after that
19 hearing, Your Honor, the Dugaboy complaint was dismissed, and a
20 few days later the DAF complaint was filed. That complaint has
21 never been served on Highland.

22 The second lawsuit is also a lawsuit filed by the
23 Sbaiti firm on behalf of an entity called PCMG in the district
24 court. And PCMG previously held less than five one-hundredths
25 of a percent interest in a certain fund managed by highland.

1 The lawsuit alleges that Highland acted improperly to sell
2 certain assets of the fund, thereby damaging PCMG. That
3 complaint has also never been served on Highland.

4 The Plaintiffs sought a stay of those matters before
5 Highland could file a response, and the court -- the district
6 court's entered stays in those matters. And Highland has filed
7 motions for reconsideration and the motions to dismiss because
8 they violate the injunction.

9 But, importantly, Your Honor, if you read the
10 motions, Highland does not argue that Plaintiffs do not have a
11 remedy for the alleged wrongs they say they suffer. Rather,
12 Highland's argument is that any claims alleged in those
13 lawsuits, just like any claims alleged in the lawsuit before
14 Your Honor today, must proceed in bankruptcy court as part of
15 the claims objection process. That's where they will have
16 their day in court. The lawsuits don't go away. The
17 injunction prevents them from continuing on in district court.

18 Accordingly, Highland is being totally consistent in
19 all matters, and the litigations may not proceed there but must
20 proceed before Your Honor. And, of course, none of these three
21 matters are implicated by the Fifth Circuit appeal.

22 Your Honor, the amended motion was procedurally
23 improper and is substantively without merit. And for all these
24 reasons, we request that the Court deny the stay motion and
25 proceed with the hearing on the motion to dismiss.

1 Thank you, Your Honor.

2 THE COURT: All right.

3 Mr. Sbaiti, you get the last word.

4 MR. SBAITI: Thank you, Your Honor.

5 Your Honor, the administrative claim process that was
6 described as being the way that these claims were supposed to
7 proceed, by the language of the order that we read, does not
8 allow for these claims. Those claims are limited to a specific
9 category of claims that don't include the claims that are
10 alleged in this lawsuit.

11 And in any event, this lawsuit wasn't filed as an
12 administrative claim. So if that's the case and it needs to be
13 refiled or reasserted as an administrative claim, then I think
14 that's a subject for another day. All I know is that we have
15 this injunction right now that either should stay this case
16 pending the appeal, which I'll address the issue on appeal in a
17 moment, or it should be dismissed, perhaps without prejudice so
18 that it can be refiled properly as an administrative claim if
19 that's what's supposed to happen, because I guess this converts
20 the matter.

21 The appeal, the subject of the appeal as to the
22 injunction, Your Honor, the appeal actually encompasses many of
23 the issues that we're talking about in this case. Now Mr.
24 Pomerantz tries to narrow the scope of what's up on appeal, and
25 that may indeed be the argument that they're going to present

1 to the Fifth Circuit or that they've presented to the Fifth
2 Circuit.

3 But the actual issue up on appeal is the
4 enforceability and validity of the order for a variety of
5 reasons which includes the provision that we're talking about
6 and the enforceability of the provision that we're talking
7 about because it gets rid of particular claims. And I guess
8 the argument back is, no, it doesn't because there's now an
9 alternative means of going there.

10 Mr. Pomerantz says that we shouldn't have proffered a
11 motion to enforce the reference. That proffer, however, was
12 because Judge Boyle's reference to this Court didn't deal with
13 our motion to -- our cross-motion to withdraw the reference.
14 All it dealt with was their motion to enforce the reference as
15 a -- to enforce the standing order in the district court. And
16 that's all she ordered was she cited the standing order and the
17 statutes, I think it's 157(a), and that's really all it did.

18 So it left open the question of whether she wanted
19 Your Honor to deal with the withdrawal of the reference
20 specifically as to the 12(b) (6) issue in the first instance.
21 It didn't resolve the question. It doesn't purport to resolve
22 that question. And it's not unheard of for the district court
23 then to send the matter to the bankruptcy court and then to
24 piecemeal which proceedings the withdrawal of the reference is
25 applicable to and then all the other proceedings would stay

1 with Your Honor or with the bankruptcy court.

2 So we weren't flouting the district court's order,
3 and we certainly weren't flouting any of the previous orders.
4 And the threat of a sanction for simply exercising our rights
5 in due course is not well taken.

6 Now Mr. Pomerantz says, well, the DAF and CLO Holdco
7 are not parties to the appeal. I don't think that's relevant
8 because if the provision is struck by the Fifth Circuit, it's
9 not only struck for the appellants, it's struck as to all.
10 It's either valid or it's invalid. And even if it's declared
11 to be invalid only as to the appellants, it's not suddenly
12 valid as to everyone else who didn't appeal. That's not
13 generally how these appeals have worked.

14 If the Court doesn't stay this matter, Your Honor,
15 and doesn't dismiss it, we still maintain, Your Honor, that as
16 it stands today, the question on the merits have been mooted
17 and we cannot proceed. I think what Mr. Pomerantz is hoping
18 for or the debtor is hoping for is a provision where our hands
19 are potentially tied to argue the motion.

20 And if the Court tells us they're not, then we'll
21 certainly argue the 12(b)(6). But what I don't want to do is
22 argue a 12(b)(6) motion that on its face appears to violate the
23 permanent injunction and then be held in contempt for violating
24 that injunction.

25 And so that's why we've asked for the Court to either

1 stay the matter under its inherent jurisdiction or to -- if
2 you're going to -- if it's not going to be stayed, then we
3 believe it has to be dismissed according to the permanent
4 injunction as it stands right now.

5 THE COURT: All right.

6 The motion to stay is denied. The amended motion to
7 stay is likewise denied. This is an odd argument. I guess one
8 might say the traditional four-factor test for a stay of a
9 proceeding has really not been the subject of the argument here
10 for a stay.

11 So suffice it to say the four-prong test for a stay,
12 you know, hasn't been met here. There hasn't been a showing of
13 substantial likelihood of success on the merits or irreparable
14 injury if the stay's not granted or a stay will not
15 substantially harm others or the stay would serve a public
16 interest.

17 But going on to the arguments that were focused on by
18 movant, I just don't think that you have shown that, you know,
19 either the exculpation clause or the injunction provisions of
20 the plan somehow tie your hands in arguing the 12(b)(6) motion,
21 defending against the 12(b)(6) motion today or I just think
22 that your arguments reflect, frankly, a misunderstanding of how
23 the injunction language and exculpation language applies here.

24 So the motion for stay is denied, and I will ask Mr.
25 Pomerantz to submit an order reflecting the Court's ruling.

1 So it looks like we have another procedural matter,
2 Mr. Sbaiti. You filed a motion to strike reply appendix of the
3 Plaintiffs quite a while back. So did you want to present
4 that?

5 MR. SBAITI: Yes, Your Honor. I think it's a very
6 simple procedural issue.

7 Generally, a party that files a 12(b) (6) is limited
8 to the four corners of the complaint. And if there's a
9 contract incorporated or a document incorporated as an
10 intrinsic part of the complaint, you know, that's usually
11 considered under the 12(b) (6) motion.

12 What the Defendants did, what the debtor here did is
13 they filed a bunch of evidence in their 12(b) (6), essentially
14 attempting to argue it as a summary judgment. We raised that
15 in our response. So as part of our response, we objected to
16 all the evidence. But then on the reply, they filed a bunch
17 more evidence both without leave and improperly, basically
18 sandbagged us.

19 And so we raised two points for striking that
20 evidence. One was akin to the first argument, which is it's
21 not an evidentiary hearing. It's not an evidentiary process in
22 the first instance. A 12(b) (6) motion has to assume that the
23 facts pled are true, and then the question is whether they
24 state a claim.

25 And, secondly, adding them to the reply is especially

1 egregious because the reply is the last word. And we didn't
2 have an opportunity to respond, and we also don't think it's
3 relevant nor should we have to respond to a whole bunch of
4 extra evidence that was attached.

5 That's essentially the basis of our motion, Your
6 Honor.

7 MR. POMERANTZ: Your Honor, the simple answer to the
8 issue is we filed the reply of the appendix in connection with
9 the motion to enforce the reference. We didn't file it in
10 connection with the motion to dismiss. The motion to enforce
11 the reference is moot. So what Mr. Sbaiti, his whole argument
12 doesn't make any sense.

13 As a substantive matter, just there wasn't any
14 evidence. It was pointing to court pleadings, orders, and
15 stuff. So it's irrelevant. I don't know why it's still on the
16 docket. It shouldn't be on the docket since it related to the
17 motion to enforce the reference.

18 THE COURT: All right. Mr. Sbaiti, did you just
19 simply --

20 MR. SBAITI: Your Honor, much of that evidence was --

21 THE COURT: -- misunderstand or what?

22 MR. SBAITI: I think we might have because it was
23 filed as a separate item, and it may have been miscalendared or
24 misapplied on our system. But the way it was presented to us
25 when we got it was it appeared to be evidence in support of,

32

1 well, I guess both, but certainly evidence that was averted to
2 in the reply.

3 But if they're saying that the Court's not going to
4 consider it, then that moots the motion and I think we can move
5 on.

6 MR. POMERANTZ: Yes, Your Honor. I had nothing to do
7 with his motion. I guess there was another mistake on their
8 end. I guess that stuff happens occasionally.

9 THE COURT: Okay. All right. So I'll deny it as
10 based on a mistake that's been acknowledged here. And so with
11 that, let's have an order cleaning that up, as well, Mr.
12 Pomerantz, please.

13 With that, we'll move on to the Defendants' motion to
14 dismiss complaint. I think, Mr. Pomerantz, you said Mr. Morris
15 will be making this argument?

16 MR. POMERANTZ: That is correct, Your Honor.

17 THE COURT: All right.

18 Mr. Morris, I'll hear your argument.

19 MR. MORRIS: Good morning, Your Honor. John Morris
20 for Pachulski Stang Ziehl & Jones for the reorganized debtor.
21 Can you hear me okay?

22 THE COURT: I can. Thank you.

23 MR. MORRIS: Okay.

24 Your Honor, this is a bit like Groundhog's Day. I
25 believe that we're going to spend the next half hour or an hour

1 discussing the very issues that were before the Court earlier
2 this year on the HarbourVest 9019 motion.

3 As the Court will recall from the June 8 hearing,
4 there is a complaint that's been filed ostensibly by the DAF
5 and CLO Holdco. As Your Honor will recall, the testimony
6 established that Mark Patrick had just been installed as the
7 trustee, had no knowledge of the prior events, and Mr. Dondero
8 and Mr. Sbaiti spent quite some time together formulating this
9 particular complaint that is nothing less than a collateral
10 attack on the Court's prior order.

11 I'd like to, if I can, just walk through a PowerPoint
12 presentation to try to make the debtor's position quite clear,
13 if I may.

14 THE COURT: You may.

15 MR. MORRIS: And I would ask my assistant, Ms. Cantly
16 (phonetic), to put up the first slide.

17 Your Honor, you'll recall that last December, the
18 debtor filed its motion under Rule 9019 for court approval of a
19 settlement. The debtor was completely and utterly transparent
20 in what the terms of the settlement were.

21 Very briefly, as set forth in Appendix 2 or Exhibit 2
22 which was the motion itself, in Paragraph 32, Your Honor, the
23 debtor set forth the terms of the transaction for which it was
24 seeking approval. Those terms included in the very first
25 bullet point a statement that HarbourVest shall transfer its

1 entire interest in CLOF to an entity to be designated by the
2 debtor.

3 And that's an important point that we'll talk about
4 in a number of different contexts, Your Honor. The debtor made
5 it very clear at the very first moment of this matter that it
6 was not going to acquire the asset but the asset was going to
7 be transferred to an entity to be designated by the debtor.

8 The debtor's motion filed last December clearly stated the
9 value of the interest that it would be acquiring in return.
10 That was also set forth in Paragraph 32 in a footnote.

11 It didn't say that it was the fair market value. It
12 said the method of valuation was the net asset value and gave a
13 valuation date of December 1st so that all parties in interest
14 who received the motion understood the economics of the deal.
15 And the deal that the debtor was asking the Court to approve
16 was one whereby HarbourVest would receive certain claims and in
17 exchange for those claims, they were going to transfer their
18 interest in CLO -- HCLOF.

19 The debtor also filed on the docket for all to see a
20 copy of the settlement agreement. The settlement agreement
21 sets forth the terms of the deal, including again the statement
22 that HarbourVest "will transfer all of its rights, title, and
23 interest in HCLOF." It actually says to an affiliate or an
24 entity to be designated by the debtor. And the transfer
25 agreement itself was also put on the docket.

1 So that's where things stood just before Christmas.
2 I know that there's some due process and other type arguments
3 that are in the Plaintiffs' opposition to the motion. But, of
4 course, the undisputed facts are that the debtor timely filed
5 the motion. The time period was consistent with all applicable
6 rules. Nobody ever asked the debtor for an extension of time.
7 Nobody ever filed a motion for an extension of time. And so
8 those due process arguments I think carry no weight at all.

9 So the debtor filed the motion. And if we can go to
10 the next slide, we see what the responses were, and there were
11 several. All of the responses, the only responses were
12 objections to the motion filed by Mr. Dondero and his certain
13 of his affiliated entities.

14 Mr. Dondero's objection can be summarized as follows.
15 He made the following observations and asserted the following
16 objections to the proposed settlement. The first thing he said
17 is that the settlement far exceeds the bounds of
18 reasonableness. Now, of course, one cannot make a
19 determination of reasonableness without having an understanding
20 of value. The debtor was giving something and it was getting
21 something.

22 And so Mr. Dondero understood that the issue of value
23 was front and center. If there was any mistake about it, he
24 also noted that he understood that as part of the settlement
25 and, again, I've written this incorrectly, HarbourVest will

1 transfer its entire interest in HCLOF to the debtor. That is
2 not what Mr. Dondero understood. In fact, Mr. Dondero
3 understood that it would transfer its entire interest in HCLOF
4 "to an entity to be designated by the debtor," again, making it
5 clear that he knew exactly what the debtor was doing here. And
6 that can be found at Appendix 4 in Footnote 3 on Page 1 if you
7 want the exact quote from Mr. Dondero's pleading.

8 In the same footnote, he also specifically
9 acknowledges that he understood the valuation. He understood
10 the method valuation. He understood the valuation date of
11 December 1st. And he urged the Court in his pleading to
12 scrutinize the settlement to make clear that the available
13 value of the investment should be realized by the debtor's
14 estate.

15 And this is such a critical point, Your Honor. His
16 concern was that by placing the value in an entity other than
17 the debtor itself, that the Court wouldn't have jurisdiction
18 over that asset. That was his concern. So not only did he
19 understand that the asset was going to be transferred to an
20 affiliate, he wanted to make sure that this Court had
21 jurisdiction over the asset.

22 And, of course, Mr. Seery in his testimony and
23 otherwise, we provided the Court with all the comfort it needed
24 to know that even though it was being assigned to a special-
25 purpose vehicle wholly-owned by the debtor, it would

1 nevertheless be subject to the Court's jurisdiction.

2 Mr. Dondero's trusts also filed an objection if we
3 can go to the next slide.

4 Dugaboy and Get Good represented by Douglas Draper
5 made the following observations and asserted the following
6 objections to the HarbourVest Settlement. They, too, made
7 clear that they understood that the asset was going to be
8 transferred to an entity designated by the debtor. They, too,
9 acknowledge that they understood that the debtor was valuing
10 the asset at approximately \$22 million as of December 1st. And
11 their objection was that the Court couldn't evaluate the
12 settlement without knowing how the asset was valued, without
13 knowing whether the debtor could acquire the asset, very
14 critical point.

15 These are the points that are made in the complaint.
16 These are the exact same points that are made in the complaint.
17 And also the Court couldn't evaluate the settlement unless they
18 understood that the value would be inure to the benefit of the
19 debtor's estate, again, mimicking Mr. Dondero's concern that by
20 placing the asset in an affiliate of the debtor, that it might
21 not be subject to the Court's jurisdiction.

22 Finally, and most importantly, if we can go to the
23 next slide. The Plaintiff, CLO Holdco, filed an objection to
24 the 9019 motion. And this is just so critical. And this is
25 the Groundhog Day aspect that I specifically speak of. CLO

1 Holdco's objection was based solely on its assertion that it
2 had a superior right to the opportunity to acquire the asset
3 that was being transferred by HarbourVest. It only made one
4 argument in support of its contention that it had a superior
5 right, but that argument was specifically premised on the
6 membership agreement, Section 6.1 and 6.2 of the membership
7 agreement.

8 CLO Holdco, the Plaintiff in the underlying action,
9 argued to this Court that HarbourVest had no authority to
10 transfer the asset without complying with the right of first
11 refusal that would give CLO Holdco the opportunity to take the
12 asset for itself. That's what this Court was told. CLO Holdco
13 didn't make this argument fleetingly. They provided an
14 extraordinarily detailed analysis of Sections 6.1 and 6.2 of
15 the membership agreement and concluded "that HarbourVest must
16 effectuate the right of first refusal before it can transfer
17 its interest in HCLOF. That was the objection. Objections
18 have consequences, as Your Honor knows.

19 If we can go to the next slide.

20 By filing an objection, CLO Holdco and the trusts and
21 Mr. Dondero became participants in the litigation.
22 Notwithstanding the Plaintiffs' arguments to the contrary, when
23 they file the objections, they participate in what's called a
24 contested matter. And in a contested matter, they had every
25 right to take all discovery on any issue that was related to

1 the 9019 motion, including the transfer, the disposition of the
2 asset to an affiliate of the debtor, the valuation of the asset
3 that's being received, the merits of the settlement itself, the
4 causes of action, whether, you know, what communications that
5 were, the negotiations, what did Mr. Seery and Mr. Pugatch
6 discuss? Right?

7 They could have taken any discovery they wanted. And
8 they did avail themselves of discovery, in fact. They did -- I
9 don't know why they did what they did, but they chose to take
10 one deposition, and that was Mr. Pugatch, okay.

11 His deposition transcript, I think is at Exhibit 7,
12 or Appendix Number 7, and it was a long deposition. It really
13 was. And they asked Mr. Pugatch at the deposition if he knew
14 what the value of the asset that was being transferred was.
15 And he said \$22.5 million. So it wasn't just Mr. Seery or the
16 debtor who was subscribing to this valuation. The party on the
17 other side of an arm's length negotiation was subscribing to
18 the exact same valuation.

19 The Plaintiffs could have taken whatever discovery
20 they wanted. This is a full and fair opportunity to
21 participate in the litigation. We proceeded to trial. Before
22 we got there, actually, the debtor filed its response to CLO
23 Holdco's objection and proffered its own very detailed and
24 apparently very persuasive analysis that CLO Holdco's objection
25 was without merit, that CLO Holdco had no right of first

1 refusal under the facts and circumstances as they existed, and
2 with Grant Scott, Mr. Dondero's childhood friend at the helm,
3 we got to Court for the contested hearing on the debtor's 9019
4 motion, and CLO Holdco withdrew their objection.

5 And I've put up on the screen just an excerpt of the
6 transcript because, you know, when we talk about whether or *res*
7 *judicata* should apply, because was there a hearing on the
8 merits? Was there a decision on the merits? Just look at the
9 words of CLO Holdco's lawyer. "CLO Holdco has had an
10 opportunity to review the reply briefing and after doing so has
11 gone back and scrubbed the HCLOF corporate documents based on
12 our analysis of Guernsey law."

13 And some of the arguments of counsel in those
14 pleadings and our review of the appropriate documents, counsel
15 obtained the authority from Mr. Scott to withdraw the CLO
16 Holdco objection based on the interpretation of the member
17 agreement. We were grateful for that and the Court
18 specifically said in response, "That eliminates one of the
19 major arguments that we had anticipated this morning."

20 Apparently, the Plaintiffs believe that those events
21 have no meaning and that this Court's reliance on CLO Holdco's
22 substantive withdrawal of its objection has no meaning. I
23 think they're wrong, and we'll get to that in a moment.

24 We proceeded with the hearing. Mr. Seery and
25 Mr. Pugatch testified at length. If you look at Footnote 3,

1 you'll see Mr. Seery testified for almost 70 pages of
2 testimony. Mr. Pugatch testified for almost 45 pages of
3 testimony. His testimony was exhaustive. And, again, any of
4 the objecting parties had the right to ask whatever questions
5 they want.

6 But I do want to just note a few things that aren't
7 up on the screen right now. If you go to Appendix 9, Your
8 Honor, which is the transcript of the hearing, at Page 13, you
9 will see that the very first thing I discussed in my opening
10 statement was the economics and how with a valuation of \$22.5
11 million this deal made sense for the debtor.

12 You will see from Pages 30 to 42 there is extensive
13 testimony from Mr. Seery about the amount and the value of the
14 asset. But the most important part of Mr. Seery's testimony is
15 that he explains how it came to be that HarbourVest agreed to
16 transfer its interest in HCLOF to an affiliate of the debtor.
17 And that came about, not because Mr. Seery or the debtor was
18 initially at all interested in doing this. The whole idea
19 originated with HarbourVest.

20 They wanted to extract themselves from the Highland
21 platform. They wanted to give this piece up. So there's no
22 conspiracy going on here. The unrebuted testimony that all of
23 the objecting parties had an opportunity to challenge was that
24 the whole idea originated with Mr. Pugatch and with
25 HarbourVest. I think that's an important point to take into

1 account.

2 And finally, again, from the hearing, if you look at
3 at Appendix 9, you'd also find that Mr. Pugatch, again,
4 testified, as he had in his deposition, as to the value of the
5 interest being transferred. So we completed the testimony. We
6 rested our case having had a full and fair opportunity to
7 contest the motion. The objecting parties rested as well. And
8 we got to the point where we had to prepare the notice, and we
9 were discussing that at the hearing, if we can go to the next
10 slide.

11 And it's very important, because again, this was all
12 done transparently, and it was all done on the record. And
13 after the close of evidence, I addressed the order that was
14 going to be prepared. I specifically said that I wanted to
15 make clear that we were going to include a provision, "that
16 specifically authorizes the debtor to engage in, to receive
17 HarbourVest the asset, you know, the HCLOF interest," right. I
18 wanted everybody to know that was what was going to happen, and
19 then I said, "The objection has been withdrawn." I think the
20 evidence is what it is and we want to make sure that nobody
21 thinks they're going to go to a different court somehow to
22 challenge the transfer. But yet, that is exactly what the
23 complaint seeks to do.

24 Having put everybody on notice as to where we were
25 going, as to what the evidence showed, the debtor drafted and

1 the Court adopted an order, and the order says, among other
2 things, that HarbourVest was authorized to transfer its
3 interest to the debtor. Actually, it says, "to a wholly owned
4 and controlled subsidiary of the debtor," pursuant to the
5 transfer agreement, "without the need to obtain the consent of
6 any party or to offer such interest first to any other investor
7 in HCLOF." So the Court heard the 9019 motion pursuant to a
8 Bankruptcy Rule and entered and order that was unambiguous and
9 that the Plaintiffs did not appeal from.

10 We can go to the next slide.

11 At a very high level, Your Honor, it is just crystal
12 clear that the complaint is just inextricably intertwined with
13 the 9019 proceedings and the order itself. I think Mr. Sbaiti
14 would agree with me that but for the order that approved the
15 transfer of the asset and the testimony about the value of that
16 asset, they have no claims.

17 Every single claim is predicated on what happened in
18 the 9019 hearing. Every single claim is predicated on the
19 Court's order approving the transfer of the asset and the
20 testimony and evidence that was adduced in relation to that
21 asset.

22 There were really only two issues that the Court -- I
23 mean, if you want to think about it at its most simplistic
24 level, the Court was being asked to assess, is it fair, is it
25 reasonable, is it legally permissible for the debtor to give

1 something. In this case, allowed claims and releases, and to
2 get something in return. In this case, HarbourVest's interest
3 in HCLOF and releases in return. And that is really the
4 gravamen of the complaint.

5 The complaint is based whether it's breach of
6 fiduciary duty or RICO or breach of contract or tortious
7 interference, whatever the claim is, none of them exist if the
8 debtor doesn't get this. They just don't exist. And that is
9 why the complaint and the proceeding are inextricably
10 intertwined. And if you just take a look at just one paragraph
11 of the pleading, it says at the core of this lawsuit is the
12 fact that HCM, that's the then debtor, purchased the
13 HarbourVest interests in HCLOF for \$22.5 million knowing that
14 they were worth far more than that. There's not a cause of
15 action that exists in the complaint that isn't dependent on
16 Paragraph 36.

17 So if we can go to the next slide with that
18 background, I'd like to argue why under 12(b), the complaint
19 should be dismissed because the claim should be barred under
20 the doctrine of *res judicata*. Luckily, Your Honor, there is at
21 least one area of agreement between the parties here, and that
22 is the purpose of the doctrine and the elements that have to be
23 satisfied in order to meet the burden of proof necessary to
24 have the claims barred. And in Footnote 1, you can -- I've
25 tried to just be helpful to the Court to show that we may not

1 cite to the exact same cases, but the parties agree that the
2 doctrine is intended to foreclose the re-litigation of claims
3 that were or could have been raised in a prior action and that
4 there's four elements that have to be satisfied for the
5 doctrine to apply.

6 The parties have to be either identical or at least
7 in privity, the judgment in the prior action had to have been
8 rendered by a court of competent jurisdiction. Number three,
9 the prior action had to have been concluded by a judgment on
10 the merits. And the last one is that the same claim or cause
11 of action was involved in both suits. So I just want to spend
12 a few minutes now, Your Honor, going through those four
13 elements to show the Court how easily the reorganized debtor
14 meets this standard.

15 If we can go to the next slide, I can take care of
16 the first two elements very quickly.

17 The first element, the debtor asserted that the
18 Plaintiffs were parties or in privity with parties to the prior
19 proceeding. That's at Paragraph 17 of the motion to dismiss.
20 The debtor relies on the deposition testimony of Grant Scott,
21 who was then the trustee of the DAF.

22 CLO Holdco is a wholly-owned subsidiary of the DAF,
23 or wholly controlled, in any event, and Mr. Scott's testimony
24 was that he was the only director and there were no employees
25 of either entity. So we, in our motion, put forth evidence to

1 establish the first element, and I don't believe, maybe I've
2 missed it. I don't believe that the Plaintiffs have contested
3 that element. If they have, I think Mr. Scott's testimony will
4 carry the day, in any event.

5 The second element as to whether or not a court of
6 competent jurisdiction is the entity or the court that rendered
7 the ruling. Of course, that's been met, too. The Plaintiffs,
8 in their opposition to the motion to dismiss, suggested that
9 the bankruptcy court would have lacked jurisdiction if their
10 cross motion to withdraw the reference was granted. They said
11 if the district court decides that mandatory withdrawal
12 applies, then it cannot find that the bankruptcy courts already
13 entered final judgment was rendered on Plaintiffs' causes of
14 action and had jurisdiction to do so. I think that's just a
15 clear misstatement of the law.

16 But in any event, Your Honor, at this point, I
17 believe it's irrelevant because the district court, in fact,
18 sent the case back to Your Honor and back to this Court. And
19 so, at the end of the day, Plaintiffs' argument doesn't hold
20 water because of the district court's ruling, which can be
21 found -- the order of reference can be found at Docket
22 Number 64. And so I think that easily takes care of the second
23 prong.

24 The third prong is whether -- if we can go to the
25 next slide -- the prior proceeding resulted in a judgment on

1 the merits. And this is really the critical point, Your Honor.
2 As the Court knows, the whole doctrine of *res judicata* is
3 designed to prevent, as the parties agree, the re-litigation of
4 claims. Stated another way, it's to bring finale. It's to
5 make sure that the Court doesn't hear the same claims and the
6 same issues that either were brought or that could have been
7 brought in a prior proceeding. And so, we believe that we
8 easily meet the standards set forth in the third prong. The
9 9019 order necessarily determined that the *quid pro quo* that I
10 described earlier was fair, reasonable, and legally
11 permissible.

12 Notwithstanding their assertions to the contrary, the
13 Plaintiffs are most definitely seeking to unwind at least one
14 half of the Court's order by belatedly claiming that they are
15 entitled to the benefit of the bargain while leaving Highland
16 burdened, frankly, with the claims that HarbourVest got as part
17 of the deal. I will tell you, Your Honor, and this is
18 argument, the debtor would never have asked for, and I don't
19 believe that the Court would ever have granted, the 9019 motion
20 if they thought that there was a risk in the future that
21 Highland wouldn't get the benefit of the bargain and it was
22 incumbent upon CLO Holdco and the DAF, and frankly, any party
23 in interest, to stand up and be counted and tell the Court and
24 the debtor, why the debtor was not entitled to do this deal and
25 CLO Holdco did that. They actually did.

1 They stood up and they filed an objection and they
2 said we have a superior right to this asset in the form of a
3 right of first refusal. They wound up folding in the face of
4 persuasive argument, and I respect the lawyer who did that. I
5 just do. But that was the time to speak up, and that's why it
6 is on the merits because that is exactly what *res judicata* is
7 intended to do. It's intended to have everybody put your cards
8 on the table. You don't put one card on the table and say, I'm
9 going to challenge this under 6.2 of the members agreement, but
10 I'm not going to tell you that I also think you owe me a
11 fiduciary duty under the Advisors Act or as the control party
12 or under any other theory that they had. They can't do that.
13 That's exactly what the problem is here.

14 If we can go to the next slide. Is it a judgment on
15 the merits? The debtor and the Court relied on CLO Holdco's
16 representation that it was withdrawing its argument, its claim,
17 its contention, its assertion that it had a superior right to
18 obtain the HarbourVest interest in HCLOF. Again, they did so
19 not whimsically, not because Mr. Kane was going to be out of
20 town and he couldn't make the hearing. He did it after, and I
21 don't think this matters frankly, but I think it's worth noting
22 that he did it after an extremely careful analysis. I would
23 tell you, Your Honor, that -- well, I would argue, Your Honor,
24 that even if Mr. Kane at CLO Holdco had never filed an
25 objection, if they'd never filed -- if they'd gotten notice

1 that this was happening and they sat silently, that would have
2 been enough for *res judicata* because the issue before the Court
3 was whether it was legally permissible for the debtor to
4 acquire this asset.

5 And if they had an obligation, if they owed a duty to
6 another party, it wouldn't have been legally permissible. And
7 if somebody believed that it wasn't legally permissible because
8 a duty was owed to them, they had an obligation to speak up.
9 And so I think it's very important, particularly for the
10 collateral estoppel argument that I'll make in a moment, that
11 CLO Holdco did in fact file an objection. It was based on the
12 breach of contract claim that's in their complaint. It's the
13 exact same claim. And they withdrew it. I think it's very,
14 very important. I think it highlights why *res judicata*
15 applies. I think it is the linchpin of the collateral estoppel
16 argument.

17 But at the end of the day, I think if they say
18 nothing, they should be estopped or precluded under *res*
19 *judicata* from now asserting -- it would be like -- I was
20 thinking about this earlier, Your Honor. If you'll remember
21 earlier this year, Mr. Dondero and his entities have kind of a
22 habit of withdrawing objections at the last minute. We had a
23 couple of sale hearings earlier this year. And the issue was
24 valuation, you know, and the process, and could the debtor meet
25 its burden of proving that the sale outside of the ordinary

1 course of business was in the debtor's best interest. And they
2 sold that restaurant. And Mr. Dondero objected. And at the
3 last second, they withdrew the objection. Did they sue
4 tomorrow? Does Your Honor really think that they could bring a
5 lawsuit tomorrow and say they just found a document or theory
6 on which the debtor had an obligation to give them a right of
7 first refusal, even though we've already closed on the
8 transaction, even though they were given notice of the
9 transaction, even though they filed an objection to the
10 transaction, even though they withdrew the objection? Would
11 the Court tolerate for one second a new pleading tomorrow from
12 Mr. Dondero that the debtor actually had a fiduciary duty to
13 give him a right of first refusal to buy that asset under
14 whatever theory, just because he pleads it and the Court has to
15 accept as true the allegations in the complaint? I think not.
16 And I think it's worth thinking about that to highlight just
17 how -- just how wrong this is.

18 Continuing on. You know, the Plaintiffs in
19 opposition say it can't be a trial on the merits because we
20 weren't parties. Of course they were parties. Again, they
21 filed an objection. They were the parties to the contested
22 matter, full stop. They rely on a case called Applewood and
23 they say, this is the very first point they make in their
24 brief. Applewood, if it wasn't *res judicata* in Applewood, how
25 could it possibly be *res judicata* here? But the facts are just

1 so inapposite, right?

2 In Applewood, you had a garden variety plan and
3 release where the debtor and the officers and directors got a
4 discharge. No objection to it. And a secured lender later on
5 sought to sue guarantors who happened to be officers and
6 directors. And the court, not surprisingly, said that the
7 confirmation order wouldn't prevent the secured lender from
8 going after the officers and directors, not in their
9 capacities, as such, but in their capacity as guarantors, which
10 were never part of the confirmation order. That just doesn't
11 apply here because here, we have the debtor making a motion
12 before the Court in which it sought permission and authority to
13 acquire a particular asset. Anybody who had a claim to that
14 asset should have stepped forward and put their cards on the
15 table.

16 And again, CLO Holdco put their cards on the table
17 and they lost, and they folded. To use the poker analogy, they
18 folded. And to hear them come into Court today and say we're
19 going to sue you because I reshuffled the deck, it's not right
20 and Applewood has no relevance.

21 Finally, Your Honor, you know, it's not on the
22 merits, they say, because you know, Mr. Seery and the debtor
23 hid the true value of the asset, and had we only known the true
24 value of the asset, we would have made all of these other
25 claims. The fact of the matter is, you either have a fiduciary

1 duty or you don't. And if you had a fiduciary duty, they
2 should have spoken up and they did only under 6.2, but they
3 did.

4 But here's the important part, Your Honor. Take the
5 allegations as true. You have to take all of the allegations
6 as true, not just some of them. And if you look at
7 Paragraph 127 of the complaint, and I would ask Ms. Canty to go
8 to Appendix 11 and let's just put Paragraph 127 up on the
9 board.

10 Here's the irony of the whole thing, right. The
11 whole complaint is based on the fact that somehow Mr. Seery was
12 engaged in insider trading. They accused him of insider
13 trading, and they say he didn't disclose the full value of the
14 asset. Just read Paragraph 127. James Dondero, who was on the
15 board of MGM, is the tippee. You've got an insider trading
16 case -- I mean, I don't represent MGM. I'm not with the SEC.
17 I don't know why Mr. Dondero thought he should be telling
18 Mr. Seery in December, 2020. It's not clear if it was before
19 or after the 9019 motion was filed. But Mr. Dondero is the
20 very source of information -- you can't make this up. He's the
21 very source of the information that he now complains Mr. Seery
22 didn't disclose.

23 Of course, Mr. Dondero, the trust, CLO Holdco could
24 have asked Mr. Seery at any time, how did you come up with your
25 valuation? Mr. Dondero, knowing that he had supplied to

1 Mr. Seery, according to Paragraph 27, please take it as true
2 for purposes of this motion only. He's the source of the
3 inside information. And now he has the audacity to come to
4 this Court, notwithstanding the Court's approval, all of the
5 time and money and effort spent in the 9019 process, and say,
6 Mr. Seery was wrong because he didn't tell CLO Holdco and the
7 DAF about the information that Mr. Dondero gave to Mr. Seery.
8 It's not right.

9 It was a judgment on the merits. And if Mr. Dondero
10 or the DAF or CLO Holdco or the trust wanted to challenge the
11 valuation, they had every opportunity to do so. And based on
12 Paragraph 127, if the Court accepts it as true, shame on them.
13 Shame on them for not pursuing this issue before. The guy gave
14 Mr. Seery, according to this allegation, and I'm just going to
15 leave it there, inside information. And he sits there in
16 silence, right? It says, look at the last sentence: "The news
17 of the MGM purchase should have caused Seery to revalue HCLOF's
18 investment." Seriously?

19 The third element is (indiscernible). The fourth
20 element, if we can go to the next slide.

21 Are they the same claims? Did the claims arise from
22 the same set of operative facts? I've addressed this pretty
23 clearly already, so I don't want to belabor the point. But
24 obviously, both the 9019 motion and the complaint arise solely
25 from the debtor's settlement with HarbourVest. The debtor's

1 acquisition of HarbourVest's interest in HCLOF and the debtor's
2 valuation of that interest. Without those three facts, there
3 is no complaint. It's just not credible to argue that the
4 fourth element is not met.

5 The case law is clear. It's quoted in the
6 Plaintiffs' opposition. It's not just the test of whether the
7 claims are the same. It's whether the claim is the same as
8 that which was brought or could have been brought.

9 In their opposition, the Plaintiffs contend that the
10 claims "did not write them until after the settlement was
11 consummated," and that the first time the plaintiffs heard
12 about the valuation of HarbourVest's interests was at the
13 January 14, 2021, hearing. I think I quoted that. If you
14 look, I don't know if it's Page 10 or Paragraph 10; the way I
15 wrote it, it's probably Page 10. I think that's a quote right
16 out of there. But of course, as we saw the debtor disclosed
17 the valuation in its very initial motion, CLO Holdco's counsel
18 elicited valuation testimony directly from Mr. Pugatch, so that
19 was before the hearing.

20 And of course, Mr. Dondero and the trusts both cited
21 in their objections the valuation. The notion that this was
22 not right, just -- it's contradicted by their own conduct,
23 their objections, their questions in deposition, the
24 information that was contained in the motion that they objected
25 to.

1 I do want to go off-script for just a minute, if we
2 could just take that down because I know that this is probably
3 something that Mr. Sbaiti may argue. And that is, well, gee,
4 but you have to take the allegation as true that Mr. Seery
5 wasn't honest, that Mr. Seery lied to the court. I don't
6 understand why there's not a fraud cause of action in there,
7 but there's not. But that's their theory.

8 And gee, how does he get to skate away Scott free if
9 he's allowed to do that with impunity, right? I will tell you,
10 Your Honor, of course you've seen Mr. Seery many times. You've
11 made your own assessments of his credibility. I'm not here to
12 argue the merits, but I will just say that the Defendants, if
13 ever forced to, will contest the allegation.

14 But here's the thing, and here's the important point
15 about, you know, whether or not he could lie with impunity and
16 say, I suspect that's where Mr. Sbaiti is going to want to go.

17 Mr. Seery said what he said. And he had a reason to
18 speak, and he spoke, and he said what he said and he told
19 everybody who would listen exactly what he was doing and how he
20 was doing it. For whatever reason, the objectors put the
21 valuation front and center. It's right in their objections.
22 They noted the objections. But for whatever reason, they did
23 nothing.

24 Whether they were negligent or whether they were
25 lying in wait is kind of irrelevant. They had a full and fair

1 opportunity to contest this issue. And if they had done so,
2 and the evidence proved what they're now alleging, they can't
3 tell you what would have happened. So, you know, HarbourVest
4 may have taken a different position. The Court may have done
5 something.

6 We're never going to know now because Mr. Seery and
7 the debtor are getting away with something, but because they
8 put in evidence that went unchallenged by Mr. Dondero and the
9 Plaintiffs. It simply went unchallenged. And they say, oh,
10 gee, that's because we didn't know. Well first of all, you
11 didn't ask. And second of all, again, the source of the inside
12 information, the reason that Mr. Seery should have known the
13 asset was worth more. The reason that he should have refrained
14 from trading and not engaged in insider information was
15 Paragraph 127. It was Mr. Dondero.

16 Here's another thing. If -- if again Mr. Seery had
17 not been honest with the Court and that was ever brought out,
18 Maybe HarbourVest -- maybe HarbourVest would have had a right
19 to complain. There's a lot in the complaint about oh,
20 HarbourVest was misled. The actual evidence that's in the
21 record, and this is part of res judicata, Mr. Seery testified
22 very clearly to the arm's length negotiation that took place.
23 He told the Court under oath that the negotiations were
24 contentious.

25 He told the Court under oath that in order to try to

1 resolve the case, he and Mr. Pugatch went off and had their own
2 private conversation without lawyers. They could have taken
3 discovery on any of that, right. What did you guys talk about?
4 It's certainly not privileged. They had every opportunity.
5 But what we do know is that Mr. Pugatch under oath, in
6 deposition, and at trial, said the value is \$22.5 million.

7 So I don't think Mr. Pugatch or HarbourVest is ever,
8 ever, every going to complain about the transaction they did.
9 Because of what the evidence simply shows. But again, you've
10 got the Plaintiffs in their complaint saying that somehow the
11 debtor and Mr. Seery in negotiating this transaction has now
12 exposed the debtor to liability. It just makes no sense.

13 So there was a time and there was a place to
14 challenge Mr. Seery. Somebody, you know, maybe HarbourVest
15 could have done something, maybe they could still do something.
16 I don't know. If they really think that there's a problem,
17 maybe we'll hear from HarbourVest someday. But the Plaintiffs
18 have no right to complain. They just don't. They knew
19 everything. They were the source of the inside information.
20 They sat on their hands, and they shouldn't be allowed to do
21 what they're doing now.

22 If we can go to the next slide. I want to move to
23 the next theory and try to finish this up. The next theory is
24 that the Plaintiffs' claims are barred by judicial estoppel.
25 The judicial estoppel argument is really, really very

1 straight-forward. And it's important because if the Court
2 thinks about this the way I do, it's that the whole issue of
3 valuation is completely irrelevant to the Plaintiffs unless
4 they can show that they were owed some kind of duty, that they
5 had some superior right to acquire the asset. But that's
6 exactly the issue that CLO Holdco relied upon and withdrew and
7 should now be estopped from pursuing. Right.

8 The legal standard, again the parties agree on, that
9 in order to be estopped, the party must take an inconsistent
10 position. And the party must have convinced the Court to
11 accept that position. Again, both prongs are easily met here
12 in just a few sentences from the January 14 hearing. You have
13 Mr. Kane saying that he understands and acknowledges and admits
14 that they have no superior right to the investment. And the
15 Court relying on that very representation in declining to
16 conduct a hearing and render a ruling on the merits of the
17 claim that was withdrawn. The objection that was withdrawn.

18 And for the avoidance of doubt, after Mr. Draper
19 spoke on behalf of the Trust, the Court, at Page 22 engaged in
20 the following colloquy. The Court asked Mr. Draper:

21 "THE COURT: Were you saying that the Court still
22 needs to drill down on the issue of whether the
23 debtor can acquire HarbourVest's interest in HCLOF.

24 "MR. DRAPER: No.

25 "THE COURT: Okay. I was confused whether you were

1 saying I needed to take an independent look of that.

2 Now that the objection has been withdrawn of CLO
3 Holdco, you're not pressing the issue.

4 "MR. DRAPER: No. I am not."

5 Okay. You can call it res judicata, you can call it
6 judicial estoppel, collateral estoppel, the two prongs are
7 easily met. They're taking an inconsistent position today and
8 through all kinds of different theories, including the one that
9 they withdrew, the Plaintiffs assert that they had a superior
10 right to acquire the interest from HarbourVest.

11 And they should have asserted those rights at the
12 hearing. That was the time. And they should be estopped now
13 from taking a completely inconsistent position from the one
14 that was before the Court. And I just do want to point out,
15 the statement from a case called Hall vs. G.E. Plastic. And
16 it's interesting, Your Honor, because there's only a few cases
17 that I focused on, because this is really more fact intensive.
18 And there isn't a dispute as to the, you know, the elements of
19 these matters.

20 But it is interesting that the Plaintiffs, you know,
21 generally ignore all of the cases that we cite to. One which
22 is Hall vs. G.E. Plastic, where the Court said that the focus
23 on the prior success or judicial acceptance requirements is to
24 minimize the degree of a party contradicting a Court's
25 determination, based on a party's prior position. That's the

1 whole point of the exercise. You can't do this. You can't do
2 this.

3 Just quickly, that leaves the individual arguments as to
4 each of the five causes of action and I just want to go through
5 some highlights. There's a negligence claim, Your Honor. And
6 we did not file a pleading, but the Court can certainly take
7 judicial notice of the fact that the effective date has
8 occurred. Under the effective date, the plan is now effective.
9 That includes the exculpation clause, as Mr. Pomerantz, I think
10 accurately and without contradiction pointed out earlier, the
11 exculpation clause applies specifically to the debtor and to
12 negligence claims. And that's not a matter that's at all
13 subject to appeal.

14 So I think just to add to the arguments that we have
15 in our papers, which I adopt and do not abandon for any
16 purpose, I would add to the argument on negligence, that it's
17 now precluded, as a result of the plan becoming effective.

18 The fiduciary duty count suffers from numerous defects. I
19 just want to point out a couple of them. They don't respond to
20 the argument under Corwin, that under the Advisor's Act, there
21 is no private right of action to sue for damages arising from a
22 breach of fiduciary duty. This claim rears its head in
23 virtually every single complaint. They've never addressed
24 Corwin. Corwin is binding on this Court, and it is unambiguous
25 that there is no private right of action to sue for damages for

1 breach of fiduciary duty under the Advisor's Act.

2 They ignore Goldstein. Goldstein is not from the
3 Fifth Circuit, but it's very persuasive authority that advisors
4 do not owe fiduciary duties to their individual investors.
5 Instead, they owe fiduciary duty to their client. Their client
6 is the entity with whom they're in contractual privity. And so
7 in this case, there's no fiduciary duty there, either.

8 The breach of contract claim. Again I just -- I
9 would just say quickly, Your Honor, it's barred under judicial
10 estoppel. Even if it wasn't, it's clear based on Mr. James'
11 analysis and admission that the debtor's, or the reorganized
12 debtor's interpretation of 6.2 is accurate. And you know, I
13 said this in the beginning. Now let me tie it in a bow because
14 the breach of contract claim, and the tortious interference
15 claim are both tied to the same thing. And that is the
16 assertion that the Plaintiffs had a right under the membership
17 agreement, a right of first refusal.

18 And they basically say that the debtor was playing
19 games. That they shouldn't be able to get through 6.2 by
20 assigning it to an affiliate. And that's where I go back, Your
21 Honor, and just remind the Court that the debtor told the whole
22 world exactly what they were doing in their motion. And their
23 objections, Mr. Dondero and the Trusts both acknowledge to the
24 whole world that they understood exactly what was happening.

25 In fact, their concern was not that it was going to

1 the debtor, but that it might be going to an affiliate outside
2 of the bankruptcy court's jurisdiction. And for them to now
3 say, having taken all of those positions -- talk about
4 inconsistent positions. They should be barred from saying
5 today, that the use of an affiliate to effectuate the
6 transaction was wrongful, because they actually told the Court
7 that they needed to -- that the Court needed to make sure that
8 it had jurisdiction over the very entity they now say somehow
9 shouldn't have been allowed to get the asset.

10 It's a bit much. So that takes care of the tortuous
11 interference.

12 The RICO claim, Your Honor, again is a motion.
13 There's so many different aspects to it. But I don't think the
14 Court needs to get past the Supreme Court holdings in HJ, Inc.
15 Again, just simply ignored by the Plaintiffs in their
16 opposition to the motion to dismiss. In HJ, Inc., the Court --
17 the Supreme Court did an exhaustive analysis to try to
18 determine and ultimately did determine, what a pattern of
19 racketeering activity meant. And the Supreme Court came to the
20 following formulation. That it had to have two or more
21 predicate related offenses that amounted to a threat of
22 continued criminal activities.

23 You know, the notion here is that the debtor and Mr.
24 Seery engaged in insider trading. We've already -- I've
25 already mentioned that according to the complaint, which the

1 Court can take as true. Mr. Dondero, himself, was the tippee.
2 But be that as it may, they don't come close to meeting the
3 very high standards set forth by the Supreme Court in HJ, Inc.
4 to show that whatever conduct Mr. Seery and the debtor engaged
5 in, and if you take the allegations as true, in not telling
6 what the fair value of the asset was, that that doesn't amount
7 to a hill of beans for purposes of RICO. That you don't have
8 any, I think predicate acts. I think here's the Court,
9 predicate acts extending over a few weeks or months,
10 threatening no future criminal conduct, do not meet RICO
11 pleading grounds. Right.

12 Security fraud claims cannot be predicate acts for
13 purposes of RICO. That is also clear. And that is really, I
14 mean they say mail, wire and fraud. But what's really at heart
15 is the 10(b) (5). Okay, it's the 10(b) (5) claim. Again, Mr.
16 Seery being -- I mean Mr. Dondero being the tippee. But those
17 are just some of the reasons.

18 None of, you know, that the RICO claim fails. You
19 know, I'll otherwise rely on the papers, unless the Court has
20 specific questions as to any of the other pieces of the motion
21 to dismiss the RICO claim, or any other aspect of the
22 Defendants' motion. I think this is clear. I think we win, no
23 matter how you slice it. It's just wrong. It's just wrong.

24 This Court will never, ever have a final order if Mr.
25 Dondero is able to engineer complaints such as this, which seek

1 to assert claims that absolutely positively could have and
2 should have been brought at the time the debtor made its
3 motion.

4 Unless the Court has any questions, I have nothing
5 further.

6 THE COURT: I do not. All right.

7 Mr. Sbaiti, I'm going to let you have as much time as
8 Mr. Morris. He took 55 minutes. As I mentioned, I have a hard
9 stop at 12:00 to do a swearing in ceremony. So if you're not
10 finished in 40 minutes, then I'm going to have to take a break
11 and come back and let you finish. All right?

12 MR. SBAITI: Thank you, Your Honor. Although I don't
13 think I'm going to be much longer than 35-ish minutes.

14 THE COURT: Okay.

15 MR. SBAITI: if not less.

16 THE COURT: Okay.

17 MR. SBAITI: I think you'll be able to be done by --
18 we'll be able to be done by noon.

19 THE COURT: All right. Thank you.

20 MR. SBAITI: Thank you, Your Honor. Your Honor, may I
21 share my screen?

22 THE COURT: You may.

23 MR. SBAITI: Thank you, Your Honor. Do you see my
24 Power Point, Your Honor?

25 THE COURT: I do.

1 MR. SBAITI: Thank you, Your Honor. I don't know
2 what which one you see. Is it the --

3 THE COURT: I see presentation.

4 MR. SBAITI: With the full page?

5 THE COURT: Yes, uh-huh.

6 MR. SBAITI: Okay, yeah, great. I just want to make
7 sure we're on the right page. Thank you, Your Honor. So Your
8 Honor, the defendant debtor is a registered investment advisor.
9 And it all begins with that. And this where the distinctions
10 between what happened in the 9019 and I'll get to the elements
11 of res judicata through argument.

12 But the first thing that has to be identified is that
13 the Defendant is a registered investment advisor. The
14 objection filed by Holdco back during the 9019 was an objection
15 against HarbourVest selling its interest by filing the right of
16 first refusal. It did not deal with the investment advisor
17 feature of Highland's relationship. And I'll get to why the
18 9019 doesn't preclude these arguments today.

19 This is essentially the structure. Highland was the
20 investment advisor of HCLOF, and Holdco is an investor in
21 HCLOF. And so Highland would owe a fiduciary duty under the
22 Advisor's Act against -- to CLO Holdco.

23 Highland also had a direct advisor relationship with
24 the DAF. And so under the Investment Advisor's Act, it owed
25 fiduciary duties to both of those entities. The law governing

1 registered investment advisors is that it's a federally
2 recognized and defined fiduciary duties. The fiduciary duty to
3 there's a fiduciary duty to affirmatively keep the advisee
4 informed and the fiduciary duty not to self-deal, i.e., not to
5 trade ahead of an advisee and opportunity that an advisee would
6 want or expect and without the advisee's expressed informed
7 consent.

8 This is a federally recognized and defined fiduciary
9 duty and it's actionable under state fiduciary duty laws.
10 While Mr. Morris ended his argument by saying we didn't deal
11 with their case law saying that there's no private right of
12 action under the Advisor's Act, the fact of the matter is that
13 Judge Boyle, about ten years ago, found that a state -- the
14 breach of fiduciary duty claim can be predicated on breaches of
15 federally imposed fiduciary duties under the Advisor's Act.
16 And that's what Douglass v. Beakley held. And that's actually
17 what we cited in our response. So I'm not sure why he would
18 argue that we haven't addressed the issue of where does this
19 private right of action come from.

20 Federal Law supplies the rules of the relationship
21 and State Law provides the cause of action for those breaches.
22 Now the scope of that has been expounded upon by many cases.
23 The Fifth Circuit held in Laird, as a fiduciary, the standard
24 of care to which an investment advisor must adhere imposes an
25 affirmative duty of utmost good faith and full and fair

1 disclosure to all material facts, as well as an affirmative
2 obligation to employ reasonable care to avoid misleading his
3 clients.

4 The word "affirmative" there is important because it
5 means the investment advisor is not supposed to wait to be
6 asked. The investment advisor as an affirmative duty to
7 proactively provide the information to the client.

8 The next standard comes from the SEC. We call it the
9 SEC interpretation letter. It's a release that came out in
10 2019. And to meet it's duty of loyalty, an advisor must make
11 full and fair disclosure to its clients of all material facts
12 relating to the advisor relationship. Material facts relating
13 to the advisor relationship include the capacity at which the
14 firm is acting with respect to the advice provided.

15 The SEC had another release in 2000 -- or excuse me,
16 in that same release, the SEC said the duty of loyalty requires
17 that an advisor not subordinate its clients interests to its
18 own. In other word, an investment advisor must not place its
19 own interest ahead of its clients' interests. An advisor has a
20 duty to act in the client's best interest, not its own.

21 The SEC general instruction three to part 2 of Form
22 ADV, that every investment advisor has to pull out. And this
23 is cited in our papers. As a fiduciary, you must also seek to
24 avoid conflicts of interest with your clients, and at a
25 minimum, make full disclosure of all material conflicts of

1 interest between you and your clients that could affect the
2 advisor relationship. This obligation requires that you provide
3 the client with sufficiently specific facts, so that the client
4 is able to understand the conflicts of interest you have, and
5 the business practices in which you engage, and can give
6 informed consent to such conflicts or practices or reject them.

7 And, finally, the Third Circuit in Belmont said:

8 "Under the best interest test, an advisor may benefit
9 from a transaction recommended to a client if, and
10 only if, that benefit, and all related details of the
11 transaction are fully disclosed."

12 These fiduciary duties are unwaivable by the advisor.
13 Any condition, stipulation or provision binding any person to
14 waive compliance with any provision of this subchapter, or with
15 any rule, regulation or order thereunder shall be void.

16 So the lawsuit does not allege that the HarbourVest
17 settlement should be undone or unwound. I'd like to move to
18 that point. Mr. Morris says well, you have to unwind half of
19 the settlement. Maybe HarbourVest doesn't have to give back
20 what it got, but Highland would still be saddled with the cost
21 of the settlement, but not with the benefit of the settlement.

22 Well, actually that's not true. There's two points
23 that we would make on that. Number one, our suit is a suit for
24 damages. In other words, the suit would be a suit for money
25 damages, based on the difference between the value of the asset

1 and what HarbourVest or what the actual value of the asset that
2 was represented, \$22.5 million. So the second point, though,
3 is that even under a situation where CLO or Holdco or the DAF,
4 or even HCLOF were to purchase the HarbourVest suit, the
5 expectation would obviously be that they'd pay the \$22.5
6 million that Highland paid for it.

7 So Highland is -- so it's not unwinding, and there's
8 no saddling Highland with a burden that they didn't otherwise
9 have, I think that's a misrepresentation. But we're not
10 seeking to unwind the lawsuit -- or excuse me, unwind the
11 settlement.

12 Now Mr. Morris is correct, the representation of
13 value by Mr. Seery is -- is one of the main points here. And
14 the representation was that the value of the entire asset. Not
15 just the shares of MGM, but the value of the entire asset was
16 \$22.5 million. So in other word, nearly half of HCLOF was
17 represented to be worth \$22.5 million. It was argued by
18 counsel on Page 14 of the January 14th transcript, and then on
19 Page 112 of that transcript, Mr. Seery specifically says the
20 current value is right around \$22.5 million.

21 Now that was also in some of the filing papers and
22 Mr. Morris put up the evidence to Your Honor that Mr. Pugatch,
23 on behalf of HarbourVest also parroted that number. But
24 there's not any evidence today about where that number came
25 from, or whether he was simply relying on Highland's

1 representation of that value.

2 Now as a general rule, in these 12(B) (6) motions, as
3 I said before, we don't look at the evidence because the whole
4 point of discovery is to find out what's behind a lot of the
5 evidence. That's been quoted. The amount of evidence that
6 went into the 9019 motion as not necessarily full-blown
7 discovery.

8 I understand Mr. Morris saying well, they could have
9 asked the question. But as I just showed you, they shouldn't
10 have to ask the question. There should be fair and full
11 disclosure of all the material facts. And if it turns out,
12 which we believe it is true, that by January, the value of
13 HCLOF was twice what it was represented, or the HarbourWest
14 portion of HCLOF was twice as to what it was represented,
15 that's a material omission that Highland had an affirmative
16 duty to not misrepresent. Irrespective of the questions being
17 asked.

18 The DAF found out later on that the representation of
19 the value wasn't true. Now Mr. Morris talked for a very long
20 time about all the opportunities that somebody, Mr. Dondero,
21 somebody other than CLO Holdco. In addition to CLO Holdco,
22 could have asked the magic question to find out whether or not
23 they were telling the truth. But that runs right in the face
24 of the standards set forth by the SEC and by the Courts as to
25 the affirmative obligation of an advisor to disclose all the

1 material benefits that they're going to get as part of a trade.
2 The idea being that when you're a registered investment advisor
3 and you want to engage in a transaction, you make a full
4 disclosure and say this is the transaction. It's worth 41, but
5 I'm paying 22-1/2. But here's why I'd like to be able to do
6 it. And then that's the discussion that happens.

7 That clearly didn't happen here. And when it turned
8 out that there was this entirely huge upside that they were
9 gaining the benefit of, and maybe HarbourVest didn't care, that
10 that was a false statement. Now the reason we don't have a
11 common law fraud claim, or that we don't necessarily hang our
12 hat on a fraud claim is we don't have enough evidence as it
13 stands today, to specifically say that Mr. Seery intentionally
14 misrepresented that. Although we believe that it was grossly
15 reckless of him to do so. But we don't really need a fraud
16 claim with a gross recklessness standard. We have a breach of
17 fiduciary duty, which basically gets us to the same place.

18 So the timeline we have is September 30th was the
19 last valuation of HCLOF assets provided by HCMLP. And the
20 value of HCLOF, at that time, or the HarbourVest of that value,
21 would have been about 22.5 million. So what it appears to be
22 is that in January or in late December, the valuation that was
23 being done -- what was being reported, wasn't the current
24 valuation. It was the valuation as of the end of the third
25 quarter of 2020.

1 On December 22nd, the motion to approve the
2 settlement with HarbourVest was filed. HCMLP should have had
3 or would have had up-to-date valuations of the HCLOF assets,
4 but didn't necessarily disclose them as being different than
5 the 22.5 million. On January the 14th, Your Honor, held the
6 9019 hearing. And then that same day, Your Honor entered the
7 approval order.

8 And finally, in March, the DAF learns the true value
9 of HLOF assets as of January 2021 and starts to look into it.
10 Now Mr. Morris makes much of the fact that well, Mr. Dondero at
11 least knew that he had tipped them off, Mr. Seery. And if you
12 actually read Paragraph 127, you'll see specifically what it's
13 purported that he said. He said stop trading in the MGM
14 assets, because MGM might be in play. So you can't trade
15 because I'm an advisor, Mr. Dondero's an insider, he's the
16 tipper, not the tippee. Mr. Seery becomes the tippee under
17 that theory of the case, and he has to, and is required to,
18 because of their affiliation at the time, he's required to
19 cease trading. And that was the purpose of saying that.

20 The collateral issue that we point is that he at the
21 very least knew about that, and that should have caused him to
22 revalue, if he hadn't done so at the time. Not that, knowing
23 that alone is sufficient to know what the value of HCLOF
24 actually was on that date. That's a complete misrepresentation
25 of the point and purpose of that allegation.

1 And as Your Honor knows, under 12(B) (6)
2 jurisprudence, the way this is supposed to go is we get the
3 benefit of every inference based upon the allegations, not the
4 movant. So the first violation is that the debtor as an IRA
5 failed to affirmatively disclose the true current valuation of
6 HClOFL and failed to keep the DAF and CLO Holdco reasonably
7 informed of the value of the assets.

8 And the debtor as an IRA, failed to obtain CLO
9 Holdco's with the DAF's informed consent before it traded in
10 the asset, because it didn't have all of the information. The
11 typical remedy for breach of fiduciary duty is typically
12 damages for any loss suffered by the Plaintiff as a result of
13 the breach. I don't think there's a debate there.

14 So now we get to Mr. Morris' key argument. His key
15 argument is that we should be talking about res judicata. The
16 elements of res judicata and I think we agree is you have to
17 have identical parties in the action; the prior judgment was
18 rendered by a Court of competent jurisdiction; the final
19 judgment was final on the merits, and the cases involved the
20 same causes of action or the same transaction and nexus of
21 facts.

22 Now I'm going to skip to three, because I think
23 that's one of the key points that we disagree with them on.
24 There is no case, Your Honor, that we could find, and no case
25 that I read them citing that says an order on an 9019 has

1 preclusive effect under res judicata under an objector to the
2 settlement. We looked. We looked in the Fifth Circuit. We
3 looked outside of the Fifth Circuit. No District Court, no
4 Fifth Circuit Court of Appeals' opinion we could find held that
5 a 9019 order has res judicata effect on an objector's
6 objection. And I think the reason is pretty simple. Is it
7 doesn't.

8 Because the Plaintiff's claims, here our claims
9 hadn't even accrued. We have a four year statute of
10 limitations, but I think more importantly is that, as the Fifth
11 Circuit said, the 9019 motion grants the Court discretion.
12 It's not supposed to be a mini trial. The Court can approve a
13 settlement over even the valid objection of an objector. It's
14 not a trial on the merits. It's not supposed to be a trial on
15 the merits. It's not supposed to be a disposition on the
16 merits.

17 So the fact that Your Honor could have approved the
18 9019 settlement with HarbourVest, even if we had a valid
19 objection, means this isn't a disposition on the merits, as res
20 judicata would envision. It wasn't a trial on the merits, even
21 though it was withdrawn.

22 The other elements that we would point out to is that
23 neither the DAV nor Holdco were parties to the dispute between
24 HarbourVest and Highland. And this keys off of the issue that
25 I just raised. The cases that are cited by the debtor to Your

1 Honor all have to do with where one of the settling parties is
2 trying to undo the settlement for some collateral reason. And
3 the Courts have held, no, that's res judicata, because you were
4 a party to the action. HarbourVest brought the claims against
5 Highland. Highland settled those claims.

6 CLO Holdco was collateral to that settlement, it's
7 not a -- excuse me, collateral to that dispute. It's not a
8 party to that dispute. Its claims weren't being resolved by
9 the settlement. And while you have a notice to all creditors
10 and those objections can be raised, there was not inherently
11 any manner for resolving those objections on their own merits.
12 Only -- it was only resolved in so far as deciding whether or
13 not the settlement was in the best interest of the debtor,
14 which Your Honor decided, and we don't challenge that. But we
15 do argue that it caused damages and the debtor shouldn't get
16 off for those damages.

17 The fourth element is that the --

18 THE COURT: Just for the record, the standard in a
19 9019 context is not best interest of the debtor, right?

20 MR. SBAITI: Your Honor, I mean that's what the rule
21 says and Your Honor's order --

22 THE COURT: That is not what the rule says. The rule
23 is actually very sparsely worded and then we have Fifth Circuit
24 case law and U.S. Supreme Court law that talk about what the
25 standard is.

1 MR. SBAITI: Yes, Your Honor. And there are five --

2 THE COURT: And it's -- is it fair?

3 MR. SBAITI: There are five elements.

4 THE COURT: Is it fair and equitable and in the best
5 interest of the estate given a long list --

6 MR. SBAITI: Correct, Your Honor. And I didn't mean
7 to --

8 THE COURT: -- of considerations that the Court is
9 supposed to consider that "bear on the wisdom of the
10 settlement." Okay. So it's actually much more involved, is my
11 point, than is it in the best interest of the estate. Is it in
12 the best interest of the estate and fair and equitable given
13 all factors bearing on the wisdom of the compromise? And then
14 we have a long laundry list of things the Court should consider
15 as part of that analysis.

16 MR. SBAITI: That's a --

17 THE COURT: I just bring that up because if I'm still
18 -- my brain is still stuck five minutes ago on your comment
19 that you can't find any case saying that an order approving a
20 9019 compromise has res judicata effect on creditors. And it's
21 -- let me just say it's shocking to me that someone would argue
22 otherwise. Bankruptcy is a collective proceeding --

23 MR. SBAITI: Your Honor --

24 THE COURT: -- where creditors can weigh in and
25 object and raise whatever arguments they think the Court should

1 consider that bear on the wisdom of the compromise. And the
2 Fifth Circuit in Foster Mortgage has said the Court should give
3 great deference to the views of the creditors, the paramount
4 interest of creditors.

5 So it's a really sort of shocking proposition that
6 the order approving a 9019 compromise wouldn't have res
7 judicata effect on all parties and interests who got notice of
8 that. So if you have any elaboration on that, I'd like to hear
9 it.

10 MR. SBAITI: Your Honor, we looked at the Fifth
11 Circuit cases that they cited, which I believe included that
12 case. And even in that case, the point that we made in our
13 papers and the point I was trying to arrive at is that among
14 the factors, yes, the Court should give great deference to the
15 creditors. But among the factors is not that the objections
16 lack merit or are meritless or that they wouldn't be winnable
17 if they were simply standalone claims.

18 And that was really the only point I was trying to
19 make is that Your Honor has discretion. Granted it's -- as you
20 mentioned, it's not unfettered discretion. It's bounded by
21 standards and there are -- there is, I know, about five
22 standards Your Honor has to consider or the Court has to
23 consider. But among those, that laundry list of standards, is
24 not that the Court finds that any objection lacks merit. And
25 that was really the only point I was making.

1 And in terms of the case law, we looked at the Fifth
2 Circuit. We looked, frankly, outside the Fifth Circuit as much
3 as we could, and because this is actually not an easy one to
4 research, as it turned out, despite the language. And we also
5 looked for district court opinions in the Fifth Circuit to see
6 did any district court or did any court of appeals give this
7 type of approval to the standard that a 9019 order has res
8 judicata effect on a claim raised in an objection by a
9 creditor.

10 And we couldn't find any and I read all the cases
11 that Mr. Morris cited in his papers, and they didn't cite one
12 that explicitly said that. They tried to drive at it through
13 insinuation that, well, if the Court has to give great
14 deference or if the Court has to take into account the
15 underlying facts and the fact that there is discovery, surely
16 that must mean this is akin to the trial on the merits. And I
17 think that's where we simply disagree in good faith. I'm not
18 ascribing any bad intention. But we disagree that that's where
19 the law goes.

20 Res judicata is not -- while it's supposed to stop
21 the relitigation of issues, it is predicated on there having
22 been actual litigation of those issues. And when HarbourVest
23 and Highland settle a case and my clients show up with an
24 objection, even though they withdraw an objection, that, in our
25 opinion -- and we're asking the Court to see it our way -- is

1 not trial on the merits. It's not a disposition on the merits
2 of the objection in and of itself. Some objections we can --

3 THE COURT: But the context matters. In the context
4 of a 9019 compromise, the hearing is about look at the bonafide
5 ease of the settlement. And it's either fair and equitable and
6 in the best interest of the estate or not. And an objector can
7 say this is a terrible settlement and here's why it's a
8 terrible settlement and let me cross-examine the movant and let
9 me put on my own witness that will enlighten the Court as to
10 why this is a terrible settlement, why I say terrible, why it's
11 not fair and equitable.

12 That's your chance to convince the Court, don't
13 approve this settlement because there are, you know, 14
14 problems with it. And if you convince the Court, then you
15 convince the Court and it's not approved. If you don't, you
16 appeal, and we do have an appeal of the settlement order.

17 So, again, I'm not understanding the "res judicata
18 doesn't apply" argument.

19 MR. SBAITI: Your Honor, if I could riff on two
20 points based upon what you just said, if I could address those.

21 The first is there are clearly two kinds of
22 objections that get -- at least two kinds of objections that
23 get raised in these 9019 approval hearings. The two that you
24 heard recounted, some were this is bad for the estate. There's
25 reasons why we don't think the estate will benefit from it and

1 it will be harmed from it.

2 And those types of objections, which I believe mostly
3 comprise the objections that Mr. Morris was talking about
4 because they are concerns for the estate. And so creditors who
5 want to get money from the estate are concerned that the
6 settlement will not enter (phonetic) to the benefit of the
7 estate, and therefore, not enter to their benefit as creditors.
8 That's number one.

9 But those don't adhere in a lawsuit. Those aren't
10 claims for damages that the settlement is going to create for
11 the person objecting or for the party objecting. There's a
12 whole separate set of objections similar to the ones HCLO
13 Holdco raised where that what inheres in the objection is this
14 is actually going to cause us some kind of damage.

15 And so, the factors though, don't require the Court
16 in those second set of instances to say, well, you know what?
17 Not only do I think you're wrong, but I think that your
18 lawsuit, the underlying causes of action that give rise to this
19 objection, have no merit on their own face, that the discovery
20 is not there to support them, that a jury is not going to find
21 there. I am now the trier or the Court is now the trier of
22 fact on the merits of the underlying causes of action that
23 animate the objection.

24 And that's where I believe we're diverging with the
25 debtor on the law. It goes too far to say that a 9019 hearing

1 where the Court in the end has discretion to approve it, even
2 over a meritorious objection by any party, regardless of what
3 bucket of objections the objection falls into. It goes -- our
4 argument today, Your Honor, and we're asking the Court to see
5 it our way, is that that would go too far. That an actual
6 cause of action shouldn't be eradicated simply because of the
7 9019 process because, as you pointed out, the Court does have
8 to go through a litany of factors.

9 And if the Court determines that it's fair and it's
10 more equitable to overrule the objection, the Court has that
11 discretion. And we're not here to unwind that discretion.

12 But the settlement process did violate certain
13 obligations and did cause my client damages. And that's what
14 we're saying isn't precluded.

15 THE COURT: Okay.

16 MR. SBAITI: The fourth element, Your Honor, which I
17 guess in many ways maps on to the argument I just made to Your
18 Honor is that the cases, the underlying cases, do not involve
19 the same claims. Plaintiffs' claims arise from the settlement
20 process itself and not from the underlying issues being settled
21 between HarbourVest and Highland. So that's why we think at
22 least three of the four elements aren't met here. And we'll
23 reserve on the papers, you know, whether jurisdiction was
24 applicable because I think that's probably water under the
25 bridge at this point in the oral argument.

1 Now, Mr. Morris attacks the case that we cite,
2 Applewood Chair vs. Three Rivers Planning. And he argues that,
3 well, this is not applicable. And the argument he made however
4 was he put it in the context of, well, the parties there, the
5 issue was you had guarantors who were not parties in their
6 capacity as guarantors. But that's not actually what the Court
7 held.

8 The Court didn't say that the release wasn't
9 applicable to them because they didn't appear as parties in
10 their guarantee capacities. They -- the Court held that, well,
11 the specific discharge language doesn't enumerate those
12 specific guarantees, and so therefore it's not released.

13 And where this dovetails, we believe, as closely as
14 we can, this isn't a 9019 case. This is a final confirmed
15 plan. But where it dovetails with what our argument is, is
16 that the Court there as well was essentially saying the
17 underlying causes of action weren't really presented to us, so
18 we're not -- we -- and the confirmation of the plan didn't
19 involve disposing of them, so we're not going to say that they
20 are precluded. And we think that that's as close an analogy as
21 we've found in the Fifth Circuit to the issues here today.

22 So I would say, Your Honor, that we believe that
23 dispenses with the res judicata argument. The judicial
24 estoppel argument, they conflate the language. I'll go back to
25 this for a second. They conflate the language of judicial

1 estoppel on the success of the claim. None of the cases they
2 cite on judicial estoppel involved where a party took a
3 position, withdrew their argument, and then the Court moved on.

4 Mr. Morris tries to convert a judicial estoppel claim
5 into a judicial reliance claim, which is not the purpose of the
6 doctrine and is not the doctrine at all. The doctrine is that
7 if you take a successful position in one court, you can't take
8 the opposite position in another court. CLO Holdco didn't take
9 a successful position in one court and then change its position
10 later on. In fact, its positions, as Mr. Morris stated, are
11 remarkably similar. They're not inconsistent, which is the
12 problem with their judicial estoppel argument. And we -- I
13 think we fairly briefed that in our papers and we'll otherwise
14 rest on the papers.

15 To deal -- to address the actual claims, again, I
16 come back to the idea of a fiduciary duty claim, which is our
17 lead claim. And to be clear, it's a state claim predicated on
18 the violation of federally imposed fiduciary duties.

19 And I'm looking for a clock to make sure I'm not
20 abusing Your Honor's time, and I don't have one right in front
21 of me because my screen -- my screen is up.

22 Your Honor, the Douglass v. Beakley case is, like I
23 said, is Judge Boyle's case. It specifically provides a cause
24 of action based upon violations of the Advisers Act. We also
25 cite about four or five other cases in footnote 8 of our

1 response from other circuits, including the Third Circuit, the
2 Belton case that I referred to earlier, all of which held that,
3 yes, a state fiduciary duty claim can be predicated on breaches
4 of a federal Advisers Act violation.

5 The other point that they make on the fiduciary duty
6 claim is they argue HCMLP doesn't owe fiduciary duties to CLO
7 Holdco. And the cases they cite, Your Honor, we dealt with in
8 the papers why they were distinguishable, because in those
9 cases they were dealing with the fact that there wasn't any
10 harm or any direct relationship. But what they ignore is the
11 actual language of the Advisers Act, which is important.

12 Well, first of all, Mr. Seery admitted in his own
13 testimony during the approval hearing in July of 2019 that he
14 says, "We owe." He says, "There are third party investors in
15 the fund -- in these funds who have no relation whatsoever to
16 Highland, and we owe them a fiduciary duty both to manage their
17 assets prudently, but also to seek to maximize value." I think
18 Mr. Seery was absolutely correct when he said that. Highland
19 owes fiduciary duties to the investors in the funds that
20 Highland manages. The core of our case is that Highland is
21 using or abusing the assets of the funds it managed in HCLOF
22 for its own enrichment, which is a classic breach of fiduciary
23 duty case under the Advisers Act.

24 Now -- excuse me. The other point that I would say,
25 Your Honor, is that there is a statutory basis for us to argue

1 a breach of fiduciary duty. Excuse me. I didn't mean to stop
2 sharing. I apologize.

3 Are you back with me, Your Honor, on my --

4 THE COURT: Yes.

5 MR. SBAITI: -- PowerPoint?

6 THE COURT: Yes.

7 MR. SBAITI: Sorry about that, Your Honor. I just
8 hit the wrong thing. I'm not very technologically savvy. Here
9 we go.

10 So Holdco is an investor in HCLOF, which is a pooled
11 investment vehicle. A pooled investment vehicle under the case
12 law we cite is simply defined as an investment vehicle that
13 doesn't publicly solicit investors and has few than 100
14 investors. Highland advises it. That's the same holding in
15 TransAmerica Mortgage, by the way, which we also cite.

16 15 U.S. C. Section 80(b)(6) establishes the federal
17 fiduciary standards to govern the conduct of registered
18 investment advisers. That's also the TransAmerica case. 15
19 U.S.C. Section 80(b)(6)(D) delegated to the SEC the power to
20 decide the scope of those duties that are imposed under the
21 statute. And so the SEC enacted 17 C.F.R. Section 275.206(4)-
22 8.

23 And it expressly states, and we cite the statute or
24 the regular in full in our papers, that the fiduciary duties
25 are owed to investors in the pooled investment vehicles. It

1 specifically says that. It talks about two different duties
2 owed and they're owed to the investors in the vehicles, which
3 means they're owed to Holdco as an investor in HCLOF, which is
4 the vehicle that Highland manages.

5 It's black and white in the regulation. And we
6 haven't seen any response. There was no response of that in
7 the reply that was filed, Your Honor. And so the argument that
8 there's not a fiduciary duty owed to Holdco because it's merely
9 an investor in HCLOF simply doesn't comport with the law.

10 And finally, the petition lays out the basis for our
11 claims including the applicable federal and state law.
12 Plaintiffs' response lays out why the legal arguments aren't
13 opposite at the 12(b) (6) stage and Rule 9(b) is met where
14 necessary under the federal claim. And I'm trying to unshare
15 so that I can get back to regular argument.

16 I'd like to briefly address Mr. Morris' argument,
17 Your Honor. Your Honor, I re-raise my argument that I made
18 before, which is that a 12(b) (6) motion and hearing is not the
19 appropriate time for all the evidence that was poured in here.
20 And I understand Mr. Morris' contention, well, it's really hard
21 to ignore all the history of this case. But a lot of that
22 history really boils down to things that were actually admitted
23 in the complaint. The complaint recognized there was a 9019.
24 But what Mr. Morris wants to do is go beyond that and to go to
25 what people said and what they must have meant. What Mr.

1 Dondero must have meant in his objection, what Dugaboy must
2 have meant by their objection, what Mr. Pugatch must have meant
3 by his testimony.

4 All of that is highly improper at this stage of the
5 proceeding, Your Honor. It's outside of the 12(b)(6) confines.
6 It's outside the four corners of the complaint. And we object
7 to all of that evidence being considered.

8 THE COURT: Let me --

9 MR. SBAITI: The question we --

10 THE COURT: Let me ask you about that procedural
11 point.

12 MR. SBAITI: Yes, Your Honor.

13 THE COURT: As we know, 12(d) provides that if
14 matters outside the pleadings are presented to and not excluded
15 by the Court in a 12(b)(6) motion, the motion must be treated
16 as one for a summary judgment under Rule 56 and all parties
17 must be given a reasonable opportunity to present all the
18 material that is pertinent to the motion.

19 Are you -- what are you arguing? That I should treat
20 it as a motion for summary judgment and give you more time to
21 present other materials? I mean, you both presented an
22 appendix, okay. And I'm telling you we're seeing this more and
23 more, I've noticed. People are going beyond the four corners
24 of a motion to dismiss and attaching things. And there's some,
25 you know, Fifth Circuit authority that says, well, if what is

1 attached is integral to understanding, you know, an allegation
2 or whatever in the pleading, you know, there is some discretion
3 to go outside the four corners.

4 So I'm trying to understand the point you're making
5 with this. Are you saying I should treat it as a motion for
6 summary judgment or do these attachments really -- you know, do
7 I have authority under the Fifth Circuit to consider them as
8 part of the 12(b)(6) motion or not?

9 MR. SBAITI: Typically, in our experience, Your
10 Honor, is when a summary or when a 12(b)(6) is going to be
11 treated as summary judgment under 12(d), the Court says that
12 and then the parties are given an opportunity, as you said, to
13 go do some discovery in order to put together the evidence and
14 materials to then come back and respond as a summary judgment.
15 We responded to a 12(b)(6) and objected to the evidence. If
16 the Court wants to treat it as a summary judgment, then we
17 would ask for an opportunity for -- to conduct discovery in
18 order to be able to respond as a summary judgment motion, but
19 we didn't -- because we responded to a 12(b)(6) --

20 THE COURT: You did the same thing though. You did
21 the same thing in your response. You submitted an appendix of
22 evidence, if you want to call it evidence. As someone pointed
23 out, it's stuff from the bankruptcy court record. I don't
24 think it went beyond what was already in the bankruptcy court.

25 MR. MORRIS: And if I -- can I be heard on this, Your

1 Honor?

2 THE COURT: You can. You can.

3 MR. MORRIS: Just to respond. This is really quite
4 simple. The motion to dismiss is based on res judicata. Res
5 judicata necessarily requires a review of what happened in
6 connection with the prior hearing. There's nothing that we
7 have identified or put forth in the appendix or on our exhibit
8 list except for the pleadings in the 9019, the transcripts, the
9 one deposition transcript, the one trial transcript, the
10 settlement agreement, the transfer agreement. I'd love to know
11 what the Court couldn't or shouldn't take judicial notice of.
12 There is no emails. There is no -- there is no -- there is no
13 extrinsic evidence, if you will. All of this is either on the
14 docket or was presented as part of the hearing.

15 THE COURT: Yeah. I'm just trying to ferret --

16 MR. MORRIS: And it's necessary. And it's necessary
17 for the motion.

18 THE COURT: Yeah. I'm just trying to ferret out the
19 procedural position that's being asserted here. And I don't
20 have the case cites off the top of my brain, but there is
21 authority from at least the Northern District judges, if not
22 the Fifth Circuit, saying in a 12(b)(6) motion I can take
23 judicial notice of items in the record. And then, you know,
24 there -- I know there's Fifth Circuit authority saying I can go
25 beyond the four corners in a 12(b) context if it's just basic,

1 you know, explaining things that are in allegations. You know,
2 such as --

3 MR. SBAITI: May I address that, Your Honor?

4 THE COURT: -- such as if a contract is in dispute,
5 okay. Like there's no way you can have a cause of action under
6 the contract and here's the contract. So I'm just trying to
7 nail down your procedural position here.

8 MR. SBAITI: Your Honor, the distinction I was trying
9 to make that I don't think I put as artfully as I might be able
10 to put now is in a 12(b) (6) if there's a contract, as you said,
11 if there's a legal document, a contract and order that's
12 integral to the case, Your Honor can take judicial notice of
13 that. Generally, a court can take judicial notice of filings
14 in a bankruptcy, the fact that they were filed.

15 So the transcripts, which Your Honor can't take
16 judicial notice of, is the truth of those. And that was what I
17 was objecting to is it's one thing for him to say an objection
18 was filed and therefore, because an objection was filed, that
19 should be it. That was your only chance. I'm not saying Mr.
20 Morris can't make that argument.

21 But when he goes beyond the fact of the filing or the
22 fact that there was a transcript or the fact that there was a
23 deposition and starts to read from the depositions or read from
24 the filings and say this is what those mean, that goes against
25 the 12(b) (6) parameters because, number one, now it's

1 substantive evidence and not simply a judicial notice of
2 something that's right there in front of the Court, i.e.,
3 something on its own docket. Because those statements and the
4 interpretation of those statements are subject to credibility
5 findings. They're subject to clarification. They're subject
6 to rebuttal. That's the purpose of discovery.

7 And so if Your Honor -- and Mr. Morris is right.
8 Usually, res judicata involves knowing what happened in the
9 prior proceedings. So if all he wants to do is rest on the
10 fact that an objection was filed by CLO Holdco and maybe even
11 other people, and that should be it and he thinks that's enough
12 for Your Honor to say res judicata applies, then I don't think
13 we have a problem. It's when he goes beyond that and says,
14 Your Honor, these people must have known and this is what they
15 meant by their argument, that's what I'm asking Your Honor not
16 to consider. And if Mr. Morris wants you to consider that,
17 that's a summary judgment motion and we should have the
18 opportunity to do discovery at the very least into the issues
19 he has now raised as supporting his res judicata defense which
20 he has the burden of proof on.

21 MR. MORRIS: Your Honor, this is one of the strangest
22 arguments I have ever heard. I'm allowed to offer the Court
23 and the Court is allowed to accept the documents, but I'm not
24 allowed to read them. I'm not allowed to make arguments. I
25 don't understand what that even means. If it were a contract,

1 I would be allowed to put the contract in front of Your Honor,
2 but I wouldn't be able to argue why the contract doesn't say
3 what the Plaintiff says. I don't get it.

4 THE COURT: Okay.

5 MR. MORRIS: That's --

6 THE COURT: Just I've heard enough on this. I don't
7 think we have moved into Rule 12(e), that realm of me needing
8 to treat this as a motion for summary judgment. I think the
9 so-called evidence, the appendix that was attached to the
10 motion as well as the appendix that was attached to Plaintiffs'
11 response, it's stuff that I can take judicial notice of that's
12 in the record of this Court and I can look at it. You know, it
13 is what it is, the record of this Court.

14 All right. So I have nine people waiting in
15 chambers. I'm trying to figure out should I take a break now
16 or are you fairly close to wrapping up. Either answer is fine,
17 Mr. Sbaiti. I just need to figure out who I make wait here.

18 MR. SBAITI: I have -- oh, I'm sorry. I didn't mean
19 to interrupt you, Your Honor. I was just going to say I have
20 five minutes left, but I know Mr. Morris probably wants to come
21 back. So if you want to break now and we can come back at
22 whenever the Court wants us to, we can do so.

23 THE COURT: All right. Why don't you make your final
24 five minutes and then we'll take a break?

25 MR. SBAITI: Okay. Thank you, Your Honor.

1 I just wanted to address some of the arguments that
2 Mr. Morris raised in his argument. The first thing is -- and I
3 addressed this in part -- but Mr. Morris makes a big deal about
4 paragraph 127 of the complaint and essentially suggests that
5 we're the -- or that Mr. Dondero is the perpetrator of a
6 nefarious scheme. Whereas, what the pleading actually says,
7 and I again encourage Your Honor to re-read -- to read it
8 specifically, is that Mr. Dondero warned Mr. Seery not to trade
9 in the stock and not to make any transactions because the stock
10 was going to appreciate in value.

11 That has two implications for us, Your Honor. Number
12 one, it means Mr. Seery was a tippee of insider information,
13 and number two, it means that Mr. Seery, if he did trade on
14 that information or if he did pass that information on to
15 someone else, that is a problem from the Advisers Act
16 standpoint, which is really the only purpose of saying that.

17 While paragraph 127 also says that that should have
18 caused Mr. Seery to revalue the NAV of HCLOF, it does not state
19 and we did not plead that the entire value of HCLOF is tied to
20 the MGM stock. So the insinuation that that somehow gave us
21 inside information about what the true value of HCLOF was and
22 we should have known or that Mr. Dondero should have known is
23 simply untrue.

24 The other argument Mr. -- that Mr. Morris likes to
25 harp on is that CLO Holdco withdrew its argument, but he

1 characterizes Mr. Kane's withdrawal testimony -- as he says,
2 Mr. Kane admitted that CLO Holdco lacked the superior right to
3 obtain the HarbourVest. If you read the very language that was
4 highlighted on Mr. Morris' slide, that's not what Mr. Kane
5 says. Mr. Kane says, "We've gone back to the drawing board.
6 We've read your reply. And my client has given me permission
7 to withdraw the argument or withdraw the objection." That's
8 all he said. There was not an admission that he was wrong.
9 There was not an admission that they had made a mistake. There
10 was simply an admission that they decided to withdraw the
11 objection for whatever reason.

12 Lastly, on the specific claims --

13 THE COURT: That's not an accurate description of the
14 record. He said he looked at --

15 MR. SBAITI: Your Honor, I was reading it along with
16 him.

17 THE COURT: -- Guernsey Law. And I don't know if his
18 words were deep dive.

19 MR. SBAITI: Yeah.

20 THE COURT: But he had looked at the agreements
21 extensively. That's just not what he said.

22 MR. SBAITI: And he said he was with -- Your Honor,
23 he said he was withdrawing. He didn't say we were wrong. He
24 didn't say we don't have a claim. What he said was, "We're
25 withdrawing the objection."

1 THE COURT: After doing an extensive look at the
2 agreements in Guernsey Law, okay, so.

3 MR. SBAITI: Sure. But, Your Honor, he might have --
4 he could just as easily thought we have a chance, but it's not
5 a good one. And frankly, we'll be here for 20 days and we're
6 withdrawing it for that reason because we'll live to fight
7 another day. Your Honor, there's an innumerable number. To
8 simply say that he admitted that they didn't have a correct
9 claim, it's just he didn't say that. That's all. That's the
10 only point I'm making.

11 Your Honor, I don't disagree with the debtor that the
12 Court's exculpation clause gets rid of the negligence claim
13 which was obviously filed before the effective date, so that
14 claim is gone.

15 And I think the last argument that Mr. Morris makes
16 on the RICO claim is the federal court, the Supreme Court
17 standard for pleading a RICO claim, that acts that only
18 continue for a few weeks are not -- don't set out a RICO claim.
19 Your Honor, in our response to that, we actually submitted an
20 amended complaint that shows that the type of acts we're
21 talking about, the pattern of the debtor using its investor
22 vehicles assets to liquidate is a long pattern and practice
23 than simply the HarbourVest suit. And so, we move to amend on
24 that basis to satisfy that pleading defect, which is the main
25 one that they focused on.

1 That's all I have, Your Honor.

2 THE COURT: All right. Thank you.

3 We're going to take a 15 minute break and come back.

4 I'll ask Mr. Jordan and Mr. Bessette did they have anything
5 they wanted to say today. I know they joined in the debtor's
6 motion. And then we'll let Mr. Morris have rebuttal.

7 All right. So we'll be back in 15 minutes.

8 THE CLERK: All rise.

9 MR. MORRIS: Thank you, Your Honor.

10 (Recess at 12:05 p.m./Reconvened at 12:23 p.m.)

11 THE CLERK: All rise.

12 THE COURT: All right. Please be seated.

13 We're back on the record in Charitable DAF v.
14 Highland Capital. All right. So I promised I was going to go
15 back to counsel for Highland CLO Funding, Ltd. So Mr. Jordan,
16 Mr. Bessette, is there anything you wanted to say for oral
17 argument?

18 MR. JORDAN: Thank you, Your Honor. John Jordan on
19 behalf of HCLOF.

20 Our points are two procedural points. The first is
21 as the Court anticipated, in our motion to dismiss filed back
22 in August, we joined in the motion to dismiss of Highland. And
23 so to the extent that the Court after deliberation is inclined
24 to grant that motion, we would ask that as a joining party,
25 HCLOF be pulled along with that.

1 The second procedural point is that back in our
2 motion to dismiss, we pointed out that the complaint does not
3 actually allege anything against HCLOF. In the story, we're
4 essentially the football and neither Oklahoma nor UT. And we
5 pointed that out as an additional argument to what you've heard
6 today. That motion was never responded to. The deadline by
7 agreement was extended to October 11th. And the lack of
8 response was, we believe, not inadvertent but simply an
9 acknowledgment that HCLOF is not a party that anything is being
10 claimed against.

11 It particularly makes sense since effectively and in
12 rough numbers, they're half owned by both sides. So for every
13 dollar that HCLOF spends hanging around the case, the parties
14 are paying essentially 100 cents collectively. So for that
15 reason, we would ask, and subject to Mr. Sbaiti's input,
16 whether the Court would ask us or direct us to upload an order
17 granting our motion as unopposed. We just feel like we don't
18 have any role in this case.

19 THE COURT: All right.

20 Mr. Sbaiti, what about that?

21 MR. SBAITI: Your Honor, they were originally added
22 as a nominal party. And as a nominal party, because of the
23 potential need to have a derivative action, I think that based
24 upon Highland's arguments and the arguments that we had, I
25 don't think the derivative action is necessary for us to

1 maintain on a go-forward basis. And so we don't oppose them
2 being dismissed.

3 THE COURT: All right. Then I assume, Mr. Morris,
4 you don't have any problem with this, correct?

5 MR. MORRIS: No, Your Honor.

6 THE COURT: Okay. So I'll look for the parties to
7 submit an agreed order of dismissal of HCLOF after the hearing.
8 All right?

9 MR. JORDAN: Thank you, Your Honor.

10 THE COURT: All right. Mr. Morris, you get the last
11 word.

12 MR. MORRIS: Thank you, Your Honor. I hope to be
13 relatively brief. I really just want to focus on the arguments
14 concerning whether or not the order that was entered by this
15 Court was an order that was entered on the merits.

16 As the Court is well aware, a 9019 motion filed by a
17 debtor is done so on notice. It is to give all parties in
18 interest an opportunity to be heard, not just as to whether or
19 not the debtor meets its burden of proof under Rule 9019 but
20 whether or not the Court can find, as it must, that the
21 proposed settlement is in the best interest of the estate.

22 The purpose of -- I mean that is the purpose of the
23 giving notice so that everybody has a chance to be heard. The
24 questions that the Court asked, the questions that every
25 bankruptcy court asks in a 9019 is can the debtor do this deal,

1 should the debtor do this deal, is it in the best interest of
2 the estate to do this deal.

3 And, you know, the idea that a 9019 order is somehow
4 res judicata only to the parties to a settlement is just
5 something that doesn't make any sense to me because it
6 abrogates so many rules that exist that allows and encourages
7 and requires parties who have objections to be heard.

8 Mr. Sbaiti's clients filed an objection. They
9 initiated a contested matter. They obtained rights. They were
10 litigants. They are litigants in a contested matter where
11 they're required to tell the Court what objections they have to
12 the settlement, and they did that.

13 Mr. Sbaiti, you know, told me that I wasn't allowed
14 to characterize the words that are used in the documents that
15 have now been admitted by the Court. And, yet, I heard him say
16 that maybe Mr. Kane (phonetic) really meant to tell Your Honor
17 that he was withdrawing the claim because he was going to save
18 it for another day.

19 I'd just ask the Court to look at the transcript. I
20 don't have to interpret it at all. And I'd ask the Court to
21 read the words. I can put them back up on the screen, but
22 they're pretty short. It's at Pages 7 and 8 of the transcript
23 of what Mr. Kane told you and what you said in response. It's
24 on the page, not my interpretation, and what the import of that
25 was.

1 Mr. Sbaiti believes, I guess, if one is allowed to
2 engage in such conduct without consequence, that one is allowed
3 to allow to file objections, cause the Court and the litigants
4 to participate, to give discovery, to write briefs, to do
5 analyses, withdraw it on the basis of their own good faith
6 analysis of Guernsey law of the documents and somehow say it's
7 irrelevant. Not what the law is, not what res judicata is
8 intended to do.

9 He should have put all of his cards on the table. In
10 fact, I think that Mr. Kane believed he was putting all of his
11 cards on the table because that's what he did. He filed a very
12 comprehensive objection. He asserted a right to the
13 opportunity that the debtor was proposing to take in the 9019
14 motion. That's what he was doing. He was objecting on the
15 basis that he claimed his client had a superior right to this
16 asset.

17 And he didn't -- like I said earlier, Your Honor, I
18 don't think he would be permitted, I don't think these claims
19 would fly today if no objection was filed. But the fact that
20 there was renders, I think, indisputable that there was a
21 finding on the merits, right. And the only reason that the
22 Court didn't rule on Mr. Kane's motion, the only reason the
23 Court didn't rule on it is because Mr. Kane withdrew it.

24 Is that really the way this process is supposed to
25 work, that one can tell the Court that after a review of the

1 documents, I'm going to withdraw the objection and then file a
2 claim for damages three months later with a different client,
3 with a different control person, with a different lawyer?
4 That's okay under doctrine of res judicata? I don't think so.

5 They had a full and fair opportunity. The fact that
6 this was somehow -- you know, they're denigrating the fact that
7 this was a 9019 motion. There's not supposed to be a mini-
8 trial. Your Honor had discretion as to what to do. Every
9 court in every bench trial has discretion as to what to do and
10 whether or not to overrule objections and whether or not to
11 substain [sic] objections. That's what judges do.

12 And there's nothing offensive about the fact that it
13 happened in the context of a 9019 motion. They don't get to
14 sit on their hands and wait to fight another day. If they
15 believed that the debtor was exposing itself to liability, and
16 that's what they actually say in the opposition, that's what I
17 actually think they say in the complaint, accept it as true,
18 they believe that the debtor created liability for itself by
19 rendering -- by entering into this transaction.

20 Shouldn't they have raised their hand and said you
21 can't do this deal, right? And the only response to that --
22 they have to that is they had no idea about value. Paragraph
23 127, Your Honor, Mr. Dondero, the architect of this complaint,
24 as was proven on June 8th, knew very well about value. And it
25 doesn't matter that it was only MGM. Your Honor commented on

1 that at the June 8th hearing in a different context. But
2 everybody knows, right, it is. He sits on the board of MGM.

3 And I'm sorry if I called him a tippee instead of a
4 tipper. But if this complaint goes forward, we'll dig into
5 that real deep. But there's no reason it ought to, Your Honor.
6 This case ought to be dismissed on res judicata grounds. It
7 should be dismissed on judicial estoppel grounds. And it
8 should be dismissed for all the reasons that I said in my
9 argument in my brief.

10 But I do just want to close with one point, and that
11 is to read from a case called Goldstein, which I think I
12 alluded to earlier on this issue of whether there's a fiduciary
13 duty that's owed by an advisor to an investor and a fund:

14 "At best, it is counterintuitive to characterize the
15 investors in a hedge fund as the clients of the
16 advisors. The advisor owes fiduciary duties only to
17 the fund, not to the fund's investors."

18 There's a lot of discussion about fiduciary duties,
19 Your Honor. But to the extent that they have any basis to
20 defeat the motion to dismiss on res judicata or collateral
21 estoppel grounds, we hope and we trust and we know the Court
22 will review the case law vigorously to test some of the
23 assertions to that.

24 I have nothing further, Your Honor.

25 THE COURT: All right. Well, thank you to all of

1 you.

2 As a reminder, I don't think you need it, but as a
3 reminder, I am essentially acting as a magistrate for Judge
4 Boyle in this action. And whichever way I go on whichever
5 theories, I think she would expect a thorough write-up. It
6 would, of course, be in the form of a report and recommendation
7 for her to either adopt or not if I dispose of some or all of
8 the counts in the lawsuit.

9 Even to the extent I deny dismissal, even though the
10 rule typically does not require a court to make detailed
11 findings and conclusions in connection with a denial of a
12 motion to dismiss, again, since I'm sitting as a magistrate, I
13 think Judge Boyle would expect some thorough explanations and
14 reasoning from me.

15 So that's my way of saying I'm taking this under
16 advisement. I am going to drill down on some of the cases that
17 have been argued. I think some important issues are raised
18 here that need some thorough reasoning.

19 So I will do the best to get this out without too
20 much delay. I think there's probably zero chance, zero chance
21 I'm going to get it done by the end of the year. We're just
22 too behind with some of our under-advisements. But I will try
23 earnestly to get it out fairly soon after the first of the
24 year. All right?

25 Thank you. You all have a good holiday.

1 THE CLERK: All rise.

2 (Proceedings concluded at 12:37 p.m.)

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5 **C E R T I F I C A T I O N**

6 We, DIPTI PATEL, KAREN WATSON, CRYSTAL THOMAS, AND
7 PATTIE MITCHELL, court approved transcribers, certify that the
8 foregoing is a correct transcript from the official electronic
9 sound recording of the proceedings in the above-entitled
10 matter, and to the best of my ability.

11

12 /s/ Dipti Patel

13 DIPTI PATEL, CET-997

14

15 /s/ Karen Watson

16 KAREN WATSON, CET-1039

17

18 /s/ Crystal Thomas

19 CRYSTAL THOMAS, CET-

20

21 /s/ Pattie Mitchell

22 PATTIE MITCHELL

23 LIBERTY TRANSCRIPTS

DATE: November 23, 2021

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